DOCKET

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(9)

. 85-434-CFX
atus: GRANTED

Title: United States, Petitioner
v.
Charlotte James, et al.

cketed:
ptember 13, 1985

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: D'Amico, Sam J., Ward, T. John

try	Date	Note	Proceedings and Orders
1	Aug 3 1985		Application for extension of time to file petition and order granting same until September 13, 1985 (White, August 6, 1985).
2	Sep 13 1985	G	Petition for writ of certiorari filed.
3	Oct 15 1985		Brief of respondent Butler and James in opposition filed.
4	Oct 18 1985		Brief of respondents Susan B. Clardy, et al. in opposition filed.
5	Oct 23 1985		DISTRIBUTED. November 8, 1985
6	Nov 12 1985		Petition GRANTED.
			**********
7	Dec 23 1985	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
8	Dec 20 1985		Record filed.
0	Dec 31 1985		Order extending time to file brief of petitioner on the merits until January 21, 1986.
1	Jan 13 1986		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
2	Jan 22 1986		Brief of petitioner United States filed.
3	Feb 21 1986		Brief of respondent Butler and James filed.
4	Feb 22 1986		Brief of respondents Susan B. Clardy, et al. filed.
5	Mar 14 1986		SET FOR ARGUMENT, Monday, April 21, 1986. (2nd case)
6	Mar 14 1986		CIRCULATED.
7	Apr 14 1986	X	Reply brief of petitioner United States filed.
8	Apr 21 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

85-434

No.

Supreme Court, U.S.
FILED
SEP 16 1985
JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLOTTE JAMES

UNITED STATES OF AMERICA, PETITIONER

v.

KATHY BUTLER, INDIVIDUALLY AND AS SURVIVING WIFE AND HEIR OF EDDY BUTLER

UNITED STATES OF AMERICA, PETITIONER

v.

SUSAN B. CLARDY, INDIVIDUALLY AND AS NATURAL TUTRIX OF THE MINORS, BRIDGET MARIE CLARDY AND KENNETH CLARDY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHARLES FRIED
Acting Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
ANDREW J. PINCUS
Assistant to the Solicitor General
JOHN F. CORDES
IRENE M. SOLET
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether 33 U.S.C. 702c, which provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place," bars respondents from recovering damages under the Federal Tort Claims Act for injuries allegedly caused by the release of flood waters from federal flood control projects.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1985

No.

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLOTTE JAMES

UNITED STATES OF AMERICA, PETITIONER

v.

KATHY BUTLER, INDIVIDUALLY AND AS SURVIVING WIFE AND HEIR OF EDDY BUTLER

UNITED STATES OF AMERICA, PETITIONER

v.

SUSAN B. CLARDY, INDIVIDUALLY AND AS NATURAL TUTRIX OF THE MINORS, BRIDGET MARIE CLARDY AND KENNETH CLARDY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit in these consolidated cases.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-38a) is reported at 760 F.2d 590. The opinion of the court of appeals panel (App., *infra*, 39a-58a) is reported at 740 F.2d 365. The opinions of the district courts (App., *infra*, 59a-65a, 66a-76a) are unreported.

JURISDICTION

The judgments of the en banc court of appeals (App., *infra*, 77a-80a) were entered on May 16, 1985. On August 6, 1985, Justice White extended the time for filing a petition for a writ of certiorari to and including September 13, 1985. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTE INVOLVED

33 U.S.C. 702c provides in pertinent part:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however*, that if in carrying out the purposes of sections 702a, 702b to 702d, 702e to 702g, 702h, 702i, 702j, 702k, 702*l*, 702m and 704 of this title it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of the Army and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

STATEMENT

1. a. The Millwood dam and reservoir, a federal project located in the State of Arkansas, is operated by the Army Corps of Engineers. One of the purposes of the project is the control of flood waters. App., *infra*, 67a, 75a. On June 8, 1979, the reservoir's water level was at "flood stage" (*id.* at 68a). The project "was in flood control status, and water was being discharged [from the reservoir] through the tainter gates of the dam structure at the rate of approximately 24,000 cubic feet per second. The water being discharged had been previously entrapped as part of the flood control function of the facility" (*id.* at 67a-68a).

Respondents Charlotte James and Kathy Butler were water skiing on the Millwood reservoir on June 8, 1979. The current created by the discharge of water from the reservoir drew respondents and the boat containing their companions toward the dam. Respondents were pulled through the dam's gates; respondent Butler's husband drowned attempting to assist his wife. The boat became lodged in the gates and its remaining passengers were rescued. App., *infra*, 68a.

Respondents James and Butler filed separate actions in the United States District Court for the Eastern District of Texas seeking damages under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* The district court found that the government had violated the duty of care imposed by Arkansas

law by "willful[ly] and malicious[ly]" failing to warn respondents of the danger from the current created by the discharge of water through the dam. App., *infra*, 70a-72a. The court stated that buoys normally were placed in the reservoir to mark the area of strong current but that government employees were aware that the buoys were not in place on June 8 (*id.* at 68a-69a). The court determined that respondents suffered damage in the amounts of $1 million for Kathy Butler and $40,000 for Charlotte James (*id.* at 70a).

The district court nonetheless entered judgment in favor of the United States on the ground that the government was immune from liability under 33 U.S.C. 702c, which provides in pertinent part that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place" (see App., *infra*, 67a, 72a). The court found that the Millwood dam's tainter gates had been opened for flood control purposes and that respondents' injuries therefore were caused by "flood control waters" (*id.* at 67a-68a, 72a).

b. The Courtableau Drainage Structure, a flood control project located in the State of Louisiana, is operated by the Army Corps of Engineers. The structure contains gates that can be opened to divert water through the West Atchafalaya Basin Protection Levee in order to prevent the water level of the Bayou Courtableau from rising higher than the levee. App., *infra*, 61a, 63a. On May 17, 1980, the structure's gates were opened because the water level "'would have caused flood conditions and flooding landside of the levee if the gates of the Courtableau Drainage Structure had not been opened'" (*id.* at

61a). Kenneth Clardy and his father, Joseph Clardy, were fishing in the Bayou Courtableau on May 17, 1980. Their boat was caught in the current created by the open drainage gates, the boat overturned, and Kenneth Clardy drowned. *Id.* at 4a.[1]

Respondent Susan B. Clardy, Kenneth Clardy's wife, commenced an action in the United States District Court for the Western District of Louisiana seeking damages under the Federal Tort Claims Act. She alleged that the Corps of Engineers failed to post adequate warnings of the danger from the current caused by the open gates. The district court granted summary judgment for the government, holding that the government was immune from liability under 33 U.S.C. 702c (see App., *infra*, 59a-63a). The court found that the drainage structure's gates had been opened in order to prevent flooding and that excess waters that create the potential for flooding are "flood waters" within the meaning of Section 702c. It concluded that Section 702c immunized the government from liability for damage caused by the release of such waters (App., *infra*, 62a).

2. The cases were consolidated on appeal and the court of appeals panel affirmed (App., *infra*, 39a-58a). The panel observed that Section 702c consistently had been interpreted to bar the imposition of liability upon the government for damage related to flood control projects (App., *infra*, 42a-47a), and stated that this interpretation of the statute presented an "insurmountable" barrier to respondents' claims because their injuries plainly were related to flood control projects (*id.* at 47a-48a).

---

[1] The district court opinion erroneously identifies Joseph Clardy as the decedent (App., *infra*, 60a-61a).

Despite the "floodtide of authority" supporting this result and "the sometimes-heard argument that Congress has signaled its agreement with [this] statutory construction by leaving the statute unchanged," the panel expressed its view that previous courts had erred in interpreting Section 702c to bar damages claims similar to respondents' claims in these cases (App., *infra*, 49a). Relying upon its interpretation of Section 702c's legislative history, the panel concluded that the provision was intended by Congress to disclaim only "liability for 'takings' and not liability for consequential damages" (App., *infra*, 55a). In the panel's view, therefore, "the Federal Tort Claims Act should subject the United States to tort claims for flood control projects in the same manner and to the same extent as a private individual under like circumstances" (*id.* at 56a (citation omitted)). The panel affirmed the district courts' judgments in favor of the government because it was bound to apply the broader interpretation of Section 702c previously adopted by panels of the Fifth Circuit (App., *infra*, 57a).

3. The full court of appeals ordered rehearing of the cases en banc and reversed the district courts' judgments by a divided vote (App., *infra*, 1a-38a). The majority concluded that the language of Section 702c contained "latent ambiguities" necessitating reference to the legislative history in order to ascertain the scope of Section 702c (App., *infra*, 5a).

The en banc court's analysis of Section 702c's legislative history differed somewhat from the result reached by the panel (see App., *infra*, 11a-20a). The court stated that in enacting the Flood Control Act of 1928, which contained Section 702c, "Congress was concerned with allocating the costs of a major

public works program between the federal government and the state and local interests, both public and private" (App., *infra*, 12a). It concluded that Congress intended Section 702c to immunize the federal government from liability for damages resulting directly from construction of flood control projects and from liability for flooding caused by factors beyond the government's control (App., *infra*, 8a, 17a-20a), but that it was "doubtful that Congress intended to shield the negligent or wrongful acts of government employees—either in the construction or in the continued operation" of flood control projects (*id.* at 18a-19a).

Turning to prior judicial interpretations of Section 702c, the en banc court rejected the conclusion of other courts of appeals that Section 702c confers immunity from liability for all damage resulting from flood control efforts (App., *infra*, 21a-27a). The court concluded that "the limitations on the immunity should be elaborated more particularly" (*id.* at 27a). It stated (*id.* at 27a-28a):

> The government is not liable for any fault of its employees in controlling floodgates or managing lands to contain, prevent, or manage floods or floodwaters. This immunity, however, does not extend to the fault of government employees in failing to warn the public of the existence of hazards to their accepted use of government-impounded water, or nearby land.

Thus, "[i]f a producing cause of the damage or injury is a government employee's negligence in omissions or commissions that diverge from acts strictly for the purpose of controlling floods or floodwaters, and the presence or movement of water for flood control purposes merely furnishes a condition

of the accident, there is no section 702c immunity" (App., *infra*, 28a).

The en banc court held that this standard required reversal of the district courts' judgments in these cases. It stated that the claims asserted by respondents James and Butler were based upon injuries resulting from the government's failure adequately to warn of the danger of the current in the reservoir. The court concluded that Section 702c did not bar these claims, apparently because it viewed the breach of a duty to warn recreational users of a danger arising from the discharge of flood waters as an omission that "diverge[d]" from the government's flood control responsibilities. App., *infra*, 28a-29a. The court remanded the action for entry of a judgment consistent with its opinion (*id.* at 30a). With respect to respondent Clardy, the court remanded to allow the development of facts concerning the adequacy of the warning of the danger resulting from the discharge of flood waters (*id.* at 29a)

Six judges dissented. Judge Gee, writing for himself and Judges Garwood, Jolly, Davis and Hill, stated that the majority's decision was contrary to "the statute's plain words and, insofar as I can understand the holding, simply brushes them aside and substitutes for them the court's notions of good policy" (App., *infra*, 32a). Judge Gee "disagreed with [the majority's] massive judicial recasting of Congressional intent," observing that "[b]oth the language of § 702c and the legislative history" showed that Congress intended to limit the government's total financial exposure as a result of a flood control program of "unprecedented scope and laden with foreseeable and unforeseeable prospects of liability" (*id.* at 34a-35a). He noted that this was the unanimous

view of previous appellate decisions construing Section 702c and that this "construction has stood for three decades without any sign of Congressional dissatisfaction" (*id.* at 36a). Judge Gee concluded that respondents' claims were barred under this interpretation of the statute. *Id.* at 34a-36a.

Judge Higginbotham filed a separate dissenting opinion. He stated that "[w]ithout clear evidence of what Congress meant to do in 1928 [when Section 702c was enacted], I would defer to the longstanding and unanimous construction placed on § 702c by this and other courts—a construction which has given specific and unambiguous content to the clause. The majority has not made the case for turning about at this date, regardless of any ambiguity of § 702c as an original proposition" (App., *infra*, 38a).

REASONS FOR GRANTING THE PETITION

When Congress in 1928 embarked upon a massive program to construct dams and other structures in order to protect the public from the destruction that frequently accompanied flooding by the Nation's rivers, one of the issues it faced was the extent to which the federal government would accept liability for damage resulting from these flood control activities. Congress made clear its intent to limit the government's financial exposure by including in the legislation an express, comprehensive affirmation of sovereign immunity: "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place" (33 U.S.C. 702c). Prior to the decision below, every court of appeals to construe Section 702c had held

that the provision is an absolute bar to monetary liability resulting from flood control projects.

The Fifth Circuit's decision radically departs from this settled interpretation of Section 702c and holds the government liable for personal injuries caused by the release of flood waters from flood control projects. This construction of Section 702c conflicts with every other appellate decision interpreting the statute and is contrary to both the plain language and purpose of the provision. Moreover, the decision below is likely to result in the imposition of substantial monetary liability upon the government for damage related to the large number of flood control projects constructed pursuant to this vast federal program. Review by this Court therefore is plainly warranted.

1. The court of appeals' view of the scope of Section 702c conflicts with the settled interpretation of the provision that has been adopted by every other court of appeals to consider the question. Each of these courts has concluded that Section 702c immunizes the government from any liability for damage related to flood control projects. See, *e.g.*, *Portis* v. *Folk Construction Co.*, 694 F.2d 520, 522 (8th Cir. 1982) (purpose of Section 702c is "to assure the government of absolute immunity for [damage caused by flooding related to] flood control projects"); *Morici Corp.* v. *United States*, 681 F.2d 645, 647-648 (9th Cir. 1982) ("if [the plaintiff's] injury resulted from the operation of [a] federal project for flood control purposes, government immunity is complete"); *Callaway* v. *United States*, 568 F.2d 684, 686-687 (10th Cir. 1978) (rejecting arguments that Section 702c did not apply to flood damage resulting from the operation of a flood control project in view of "broad and emphatic language of § 702c"); *Parks* v. *United*

States, 370 F.2d 92, 93 (2d Cir. 1966) (same).[2] Prior to the en banc court's decision in this case, the Fifth Circuit also adhered to this view. See *Florida East Coast Railway* v. *United States*, 519 F.2d 1184, 1192 (5th Cir. 1975) (Section 702c grants immunity from liability for damage resulting from flood waters in "the broadest and most emphatic language") (footnote omitted).

The court of appeals expressly rejected this interpretation of the statute. Although respondents' claims are based upon damage caused by the release of flood waters from flood control projects, and therefore would be barred under the prevailing interpretation of Section 702c, the court of appeals ruled that Section 702c did not immunize the government from these claims. App., *infra*, 21a-28a. Indeed, the panel's conclusion (*id.* at 47a-49a, 57a) that it was required by prior Fifth Circuit decisions to hold that Section 702c barred respondents' claims makes clear that the decision below, which overruled the panel decision, conflicts with the settled interpretation of Section 702c. Judge Gee correctly observed in his dissenting opinion that the majority had repudiated the "unanimous construction [of Section 702c that] has

---

[2] See also *Pierce* v. *United States*, 650 F.2d 202 (9th Cir. 1981); *Aetna Insurance Co.* v. *United States*, 628 F.2d 1201 (9th Cir. 1980), cert. denied, 450 U.S. 1025 (1981); *Burlison* v. *United States*, 627 F.2d 119 (8th Cir. 1980), cert. denied, 450 U.S. 1030 (1981); *Taylor* v. *United States*, 590 F.2d 263 (8th Cir. 1979); *Lenoir* v. *Portera Creek Watershed District*, 586 F.2d 1081 (6th Cir. 1978); *McClaskey* v. *United States*, 386 F.2d 807 (9th Cir. 1967); *Clark* v. *United States*, 218 F.2d 446 (9th Cir. 1954); *National Manufacturing Co.* v. *United States*, 210 F.2d 263 (8th Cir.), cert. denied, 347 U.S. 967 (1954).

stood for three decades" (App., *infra*, 36a). See also *id.* at 38a (Higginbotham, J., dissenting).

2. Moreover, the court of appeals' crabbed interpretation of Section 702c is contrary to the provision's plain language and purpose and improperly deviates from the longstanding uniform construction of the statute.[3]

a. It is difficult to imagine a grant of immunity from damages liability more comprehensive than Section 702c: "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." By using all-encompassing terms such as "liability of any kind," "any damage," and "any place," Congress signalled that Section 702c confers blanket immunity from damages liability in the flood control context. *National Manufacturing Co.* v. *United States*, 210

[3] Although Section 702c was enacted as part of the Flood Control Act of 1928, the provision consistently has been interpreted to bar liability for damage related to flood control projects authorized by other statutes. See *Aetna Insurance Co.* v. *United States*, 628 F.2d 1201, 1204 (9th Cir. 1980), cert. denied, 450 U.S. 1025 (1981); *Lenoir* v. *Portera Creek Watershed District*, 586 F.2d 1081, 1086 & n.4 (6th Cir. 1978); *National Manufacturing Co.* v. *United States*, 210 F.2d 263, 270 (8th Cir.), cert. denied, 347 U.S. 967 (1954).

The Courtableau Drainage Structure is part of a project that was authorized by the Flood Control Act of 1928, as amended in 1936 (see 33 U.S.C. 702a-4 and 702a-6) and the Millwood project was authorized by the Flood Control Act of 1946 (see ch. 596, 60 Stat. 641, 647). The court below criticized the decisions holding that subsequent flood control acts had reenacted Section 702c, but did not dispute that Section 702c was applicable to damage related to these projects (see App., *infra*, 24a-25a n.23).

F.2d 263, 271 (8th Cir.), cert. denied, 347 U.S. 967 (1954). Indeed, as Judge Gee demonstrated in his dissenting opinion (App., *infra*, 31a-32a), any attempt to make the provision *more* comprehensive would "serve small purpose beyond making the enactment read like an insurance company's form general release rather than a statute." Given the plain language of Section 702c, "it requires some ingenuity to create ambiguity." *Rothschild* v. *United States*, 179 U.S. 463, 465 (1900).

The court of appeals nonetheless concluded that there were "latent ambiguities" in Section 702c (see App., *infra*, 5a-7a), stating that the term "damage" was "quite equivocal" because it could include damage to land but not damage to persons (*id.* at 7a & n.7) and that the terms "flood" and "flood waters" were ambiguous (*id.* at 7a n.6). The court's discovery of "ambiguities" undetected by any other appellate court that has construed Section 702c appears to be a product of the court's eagerness to adopt a narrow construction of the statute rather than the result of an objective evaluation of the statute's terms. For example, Congress's use of the phrases "[n]o liability of any kind" and "any damage" virtually compels the conclusion that all types of damage—harm to persons as well as to property—are included within the scope of Section 702c. The court of appeals itself observed with respect to another of these supposed ambiguities that it was not "clear why 'at any place' was tacked on to the sentence, inasmuch as the immunity language is already comprehensive without it" (*id.* at 7a (footnote omitted)). The reason has been apparent to every court of appeals except for the court below: Congress wrote broadly to ensure that the government would not be subjected to monetary lia-

bility for *any* damage related to the federal flood control program.[4]

In addition, the interpretation of Section 702c adopted by the court of appeals directly conflicts with the plain language of the statute. The court stated that the immunity from liability conferred by Section 702c "does not extend to the fault of government employees in failing to warn the public of the existence of hazards to their accepted use of government-impounded water, or nearby land" (App., *infra*, 28a). Thus, where "the presence or movement of water for flood control purposes merely furnishes a condition of the accident, there is no section 702c immunity" (*ibid.*).

The flaw in this interpretation of Section 702c is that it is contrary to Congress's declaration that the government is immune from liability for "any" damage "from or by" flood waters, without regard to the character of the act that caused the damage. Congress plainly concluded that in view of the vast scope of the flood control program, the fact that the damage was caused by flood waters was a sufficient reason to bar liability. The court of appeals' determination to qualify that immunity "simply brushes [the statute's

[4] The court of appeals stated (App., *infra*, 6a-7a n.5) that the Congress that enacted Section 702c considered the immunity provision ambiguous, but the authorities cited by the court do not support this assertion. There is no reference to Section 702c in the portion of the congressional debates quoted by the court of appeals (see 69 Cong. Rec. 8187 (1928) (remarks of Sen. King)). In addition, the committee report cited by the court states that the *proviso* of Section 702c was amended to clarify its meaning; the report does not refer to the portion of the statute setting forth the government's immunity from liability for damages (see 69 Cong. Rec. 8119 (1928)).

plain words] aside and substitutes for them the court's notions of good policy" (App., *infra*, 32a (Gee, J., dissenting)).[5]

b. The interpretation of Section 702c adopted by the court below also undercuts Congress's purpose in enacting Section 702c. The Flood Control Act of 1928, which contained Section 702c, marked the beginning of the federal government's effort to control flood waters, and thereby prevent the loss of human life and property that invariably accompanied flooding by the Nation's rivers, through the construction of massive systems of levees, dams, reservoirs, and spillways.[6] Congress realized that the cost of the pro-

[5] The court of appeals intimated that its decision "elaborate[s] more particularly" the limitations on the government's immunity articulated in previous cases (App., *infra*, 27a). Some courts have stated that Section 702c does not apply when damage is caused by an act that is "wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control, or any act undertaken pursuant to any such authorization." *Peterson* v. *United States*, 367 F.2d 271, 275-276 (9th Cir. 1966); see also *Morici Corp.* v. *United States*, 681 F.2d at 647-648; *Hayes* v. *United States*, 585 F.2d 701, 702-703 (4th Cir. 1978); *Graci* v. *United States*, 456 F.2d 20, 26-27 (5th Cir. 1971). In *Peterson*, for example, the court held that Section 702c did not confer immunity from liability because the plaintiff's claim was based upon a flood that resulted from the dynamiting of an ice jam by government employees. However, these cases provide no support for the conclusion of the court below that damage resulting from the operation of flood control projects for flood control purposes is outside the scope of the immunity conferred by Section 702c.

[6] The federal government previously had participated in a joint project with state and local authorities to construct levees in order to contain the flood waters of the Mississippi River. This approach to flood control was proven unsuccessful by the disastrous flood of 1927, and the 1928 statute reflected

gram would be enormous—estimates ranged from $300 million to over $500 million (H.R. Rep. 1100, 70th Cong., 1st Sess. 13, 21-22 (1928)); 69 Cong. Rec. 5485 (1928) (statement of Sen. Jones)—and one of its main concerns was ensuring that the federal government's financial liability would not be expanded beyond these direct costs.

In a message to Congress concerning the flood control proposals, President Coolidge stated that "it would be very unwise for the United States in generously helping a section of the country to render itself liable for consequential damages" (69 Cong. Rec. 7126 (1928)). A number of congressmen also expressed the view that the federal government should not be liable for costs other than the direct cost of constructing the project. See *id.* at 7028 (statement of Rep. Spearing); *id.* at 6999-7000 (statement of Rep. Frear); *id.* at 6641 (statement of Rep. Snell).

This congressional concern undoubtedly was the motivating force underlying the enactment of Section 702c. Congress restated the government's sovereign immunity from damages liability in order to make clear that the only costs of the flood control program that would be borne by the United States were the costs that the government specifically assumed by statute. As the court concluded in *National Manufacturing Co.* v. *United States*, *supra*, the first appellate decision to construe Section 702c, "when Congress entered upon flood control on the great

---

a new approach under which flood waters would be diverted along predetermined courses through the use of dams and spillways in addition to the construction of levees designed to confine the river to its banks. H.R. Rep. 1100, 70th Cong., 1st Sess. 14 (1928); H.R. Rep. 1072, 70th Cong., 1st Sess. 5-7, 17 (1928); App., *infra*, 12a-13a.

scale contemplated by the [Flood Control] Acts it safeguarded the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language. The cost of the flood control works itself would inevitably be very great and Congress plainly manifested its will that those costs should not have the flood damages that will inevitably recur added to them." 210 F.2d at 270; accord *Callaway* v. *United States*, 568 F.2d at 686; *Graci* v. *United States*, 456 F.2d 20, 25-26 (5th Cir. 1971); *Peterson* v. *United States*, 367 F.2d 271, 275-276 (9th Cir. 1966).[7]

The court of appeals offered a revisionist view of Section 702c, asserting that Congress intended to address only damage directly associated with the construction of flood control projects, such as damage resulting from the rerouting of flood waters by such projects (App., *infra*, 8a, 12a, 18a). In support of this interpretation, the court stated that Section 702c replaced a provision in the Senate bill providing monetary compensation for property damaged as a result of the implementation of a flood control plan, and thus that "the disclaimer of liability must be read as a direct negation or repudiation of the provision it superseded, which would have provided munificence to those whose property was affected [by a flood

---

[7] The only portion of the legislative history that specifically addresses the meaning of the grant of immunity contained in Section 702c confirms this conclusion. A congressman stated that "[w]hile it is wise to insert that provision in the bill, it is not necessary, because the Supreme Court of the United States has decided * * * that the Government is not liable for any of these damages [resulting from flooding]" (69 Cong. Rec. 7028 (1928) (statement of Rep. Spearing)). Section 702c thus was viewed as a restatement of the government's sovereign immunity from damages liability.

control project]" (App., *infra*, 17a). Therefore, according to the court of appeals, Section 702c only bars claims by property owners for damage caused by the construction of flood control projects.

The court of appeals' conclusion is based upon an erroneous analysis of the legislative history. The House debate makes clear that the provision that became Section 702c was an addition to the Senate bill, not a substitute for an existing provision. See 69 Cong. Rec. 7022-7023 (1928).[8] Thus, Section 702c cannot be interpreted by reference to the limited scope of the Senate bill provision.[9] In addition, Congress could have accomplished the narrow purpose attributed to Section 702c by the court of appeals simply by deleting the offending provision of the Senate bill. Accordingly, Section 702c must have been intended to serve the broader purpose of restating

---

[8] In fact, the provision cited by the court of appeals was superseded by another provision discussing the acquisition of flowage rights with respect to property damage caused by the diversion of flood waters by flood control projects. See 33 U.S.C. 702d; 69 Cong. Rec. 7030-7031, 7104-7113 (1928).

[9] The court of appeals also justified its interpretation of Section 702c on the grounds that the congressional debate related only to claims for property damage and that the terms "liability" and "damage" were used during the debate to refer to damage caused by the construction of flood control projects (App., *infra*, 8a). However, the court of appeals presented no evidence that Congress intended to limit the scope of Section 702c to these circumstances. Even if the congressional debate did focus upon property damage of this type, that fact "does not create a 'negative inference' limiting the scope of [Section 702c] to the specific problem that motivated its enactment" (*Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 679 (1983)). See also *American Bank & Trust Co.* v. *Dallas County*, 463 U.S. 855, 867 (1983).

the government's sovereign immunity with respect to all aspects of the flood control program.

Moreover, even the court of appeals declined to construe Section 702c in the manner dictated by its analysis of the legislative history. The court summarized its view of the legislative history by stating that "[i]t seems doubtful that Congress intended to shield the negligent or wrongful acts of government employees—either in the construction or in the continued operation of the Mississippi [flood control] plan" (App., *infra*, 18a-19a). Yet it held that the statute *does* immunize the government "for any fault of its employees in controlling floodgates or managing lands to contain, prevent, or manage floods or floodwaters" (*id.* at 27a-28a). This conclusion indicates that the court itself may not have been persuaded by its reading of the legislative history.

c. Finally, the court below erred by rejecting the settled, unanimous construction of Section 702c. This Court several times has recognized that it is appropriate to adopt the construction of a statute supported by "longstanding [judicial] interpretation and * * * continued congressional silence" (*Gulf Oil Corp.* v *Copp Paving Co.*, 419 U.S. 186, 200-201 (1974)). See also *Flood* v. *Kuhn*, 407 U.S. 258, 283-285 (1972); *Missouri* v. *Ross*, 299 U.S. 72, 75 (1936). Here, the court of appeals should not have rejected the interpretation of Section 702c that has been settled for over 30 years. Judge Higginbotham correctly concluded that the court should have "defer[red] to the longstanding and unanimous construction placed on § 702c by [the Fifth Circuit] and other courts" and that "[t]he task of changing such a settled construction should * * * be left to Congress" (App., *infra*, 38a).

3. Congress enacted Section 702c because it realized that it was embarking upon a vast public works program that might greatly increase the government's financial exposure. Congress's expectations have been realized in the scope of the government's present-day flood control program.[10] Several different federal agencies operate projects designed to control flood waters. Thus, the Army Corps of Engineers administers approximately 518 flood control structures, the Bureau of Reclamation operates some 54 reservoirs that serve flood control purposes, the Soil Conservation Service administers approximately 8,592 flood control dams, and the Tennessee Valley Authority operates or manages some 35 dams that serve flood control purposes.[11] Flood control dams typically are attached to reservoirs that retain flood waters, and many of the reservoirs in these projects are extremely large.

In view of the vast size of the flood control program, the rule adopted by the court below is likely to subject the government to enormous financial liability. Damage to both persons and property is unavoidable in an undertaking of this magnitude because it is simply impossible to monitor the operation of all of these flood control structures.[12] The unpredictability of water levels increases the difficulty of this task.

---

[10] As we discuss above (see page 12 note 3, *supra*), Section 702c applies to all federal flood control projects.

[11] This information was supplied to us in each case by the agency that operates the facilities.

[12] Although this case involves personal injuries, it is not clear that the Fifth Circuit views its rule as restricted to this context. A Fifth Circuit panel recently reversed and remanded a case involving property damage in which the district court had granted the government's motion for summary judgment on the ground that the government was immune from liability under Section 702c. *Stelly* v. *United States*, 598 F. Supp. 344 (W.D. La. 1984), rev'd and remanded, No. 85-4015 (5th Cir. Aug. 1, 1985).

Even within the Fifth Circuit the government's potential financial exposure is quite large, because more than 2000 flood control structures are located in this area. Thus, if the interpretation of Section 702c adopted by the court below were confined to the Fifth Circuit, the decision still would increase the government's liability substantially. In the present cases alone, for example, the judgments exceed $1 million. Review by this Court is warranted to uphold Congress's determination that the government should be immune from liability for damage related to the flood control program.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted

CHARLES FRIED
Acting Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

ANDREW J. PINCUS
Assistant to the Solicitor General

JOHN F. CORDES
IRENE M. SOLET
Attorneys

SEPTEMBER 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 83-2276, 83-4522

CHARLOTTE JAMES, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

KATHY BUTLER, Individually and as Surviving Wife and Heir of EDDY BUTLER, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

SUSAN B. CLARDY, Individually and as Natural Tutrix of the Minors, BRIDGET MARIE CLARDY and KENNETH CLARDY, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

May 16, 1985

Appeal from the United States District Court
for the Eastern District of Texas

Appeal from the United States District Court
for the Western District of Louisiana

Before CLARK, Chief Judge, GOLDBERG, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS and HILL, Circuit Judges.*

REAVLEY, Circuit Judge:

These cases present the question whether Section 3 of the Flood Control Act of 1928, 33 U.S.C. § 702c (1982), gives the United States absolute immunity where there would otherwise be liability under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (1982), for personal injury resulting from government employees' negligent failure to warn of government-created hazards to known recreational users. We hold that the 1928 Act provides no such immunity, because the government's provision for the safety of recreational users of public waters is discrete from the government's control of floodwaters.

I. STATEMENT OF THE CASE

A. James v. United States

On June 8, 1979, the United States Corps of Engineers was discharging water in great volume through the Millwood Dam in Arkansas. The release of waters created a violent current near the dam. No signs warned of the danger. A cable strung with orange buoys usually delineated the area of danger, but it had broken and drifted away when struck by floating debris. Government personnel knew these

---

* Judge Goldberg, now a senior judge of this circuit, is participating as a member of the panel initially deciding the appeal now subject to en banc review. 28 U.S.C. § 46(c) (1982).

warning devices were not in place, but did not attempt to repair them. They took no other steps to warn the public.

Charlotte James and Kathy Butler happened to be skiing near the dam. The skiers fell and were pulled by the strong current through the tainter gates; both were injured. Eddy Butler, Kathy's husband, dived into the water to try to save his wife, but was also pulled through the structure. He drowned. The survivors sought relief under the Federal Tort Claims Act.

After a bench trial, the district court found that the plaintiffs were not negligent, that government agents had willfully and even maliciously[1] failed to warn of a known danger, and that this failure had been a proximate cause of the plaintiffs' injuries. The judge set the damages at $1,000,000 to Kathy Butler for her injuries and for the wrongful death of her husband, and at $40,000 for Charlotte James' personal injuries. He concluded, however, that section 702c barred plaintiffs' recovery because the injuries resulted from floodwaters related to a flood control project. We reverse, holding that section 702c presents no bar.

---

[1] The parties have assumed that a showing of willful or malicious conduct is necessary for appellants to recover. The Federal Tort Claims Act provides for governmental liability "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674 (1982). The trial court applied the Arkansas Recreational Use Statute, Ark.Stat.Ann. §§ 50-1101-1107 (1971 & Supp. 1983), which imposes on the owner of land used by others only a minimal duty: not to injure such persons by willful or malicious conduct. Ark.Stat.Ann. § 50-1106(a) (1971).

B. Clardy v. United States

On May 17, 1980, Kenneth Clardy and his father, Joseph Clardy, were fishing in Bayou Courtableau in Louisiana. The bayou is a United States flood control project designed to take excess floodwaters from the Bayou Courtableau Basin through the protection levee of the West Atchafalaya Basin. When government employees opened the gates of the structure to full capacity, a strong current resulted. Only two faded signs at the entrance of the drainage structure warned of the dangerous current. The boaters could not see the signs until they had already been swept into the current. The Clardys' boat became disabled and drifted into the inlet channel. As it was drawn through the open gates of the spillway, the boat overturned and Kenneth Clardy was thrown into the approach basin. He drowned while being pulled through a 22-foot-long barrel of the drainage structure.

The district judge entered summary judgment for the government, holding that any negligence was related to the operation of a flood control project and therefore fell within the immunity of section 702c. We reverse the summary judgment.

II. THE IMMUNITY PROVISION AND ITS AMBIGUITIES

The starting point in every case involving construction of a statute is the language itself. The applicable provision of the Mississippi Flood Control Act of 1928 reads:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of

> . . . this title it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of the Army and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow damage or floodgage rights over such lands.

33 U.S.C. § 702c (1982) (emphasis in original). Without a clearly expressed legislative intention to the contrary, statutory language must usually be considered controlling. *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, —— U.S. ——, ——, 104 S.Ct. 2105, 2110, 80 L.Ed.2d 753, 761 (1984). Although we hold the statutory language paramount in this case, we have recourse to the history and purpose of the statute to eludicate what we consider to be latent ambiguities. "Where, as here, resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear." [2] *Blum*

---

[2] The Supreme Court earlier refined this plain-meaning rule, which "is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.' The circumstances of the enactment of particular

v. Stenson, —— U.S. ——, ——, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891, 900 (1984). Properly viewed, the language of the statute is perfectly consonant with the legislative history, but we think it essential to understand the latter in order to view the statute itself correctly.[3]

We do not see the language of the immunity provision as being clear-cut and unambiguous,[4] "however clear the words may appear on 'superficial examination.'"[5] *United States v. American Trucking*

---

legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect." *Watt v. Alaska*, 451 U.S. 259, 266, 101 S.Ct. 1673, 1678, 68 L.Ed.2d 80, 88 (1981) (quoting *Boston Sand Co. v. United States*, 278 U.S. 41, 48, 49 S.Ct. 52, 54, 73 L.Ed. 170 (1928) (Holmes, J.)) (footnote omitted).

[3] "The actual words used [in a statute] are important but insufficient. The report of congressional committees may give some clue. Prior drafts of the statute may show where meaning was intentionally changed. Bills presented but not passed may have some bearing. Words spoken in debate may now be looked at." Levi, *An Introduction to Legal Reasoning*, 15 U.Chi.L.Rev. 501, 520 (1948). In the words of Chief Justice Marshall, "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived." *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386, 2 L.Ed. 304, 313 (1804).

[4] William Empson has defined "ambiguity" as "any verbal nuance, however slight, which gives room for alternative reactions to the same piece of language." W. Empson, *Seven Types of Ambiguity* 19 (Penguin ed. 1977).

[5] Even dissenting voices at the Congressional debates objected to the ambiguities of the bill as passed: "Serious objection to the pending bill is justified because of the uncertainty and ambiguity of its provisions . . . . The bill is just as uncertain, just as ambiguous, just as all-comprehensive and embracing, as subject to criticism and objection now as it was

Associations Inc., 310 U.S. 534, 544, 60 S.Ct. 1059, 1064, 84 L.Ed. 1345, 1351 (1940) (quoting *Helvering v. New York Trust Co.*, 292 U.S. 455, 465, 54 S.Ct. 806, 809, 78 L.Ed. 1361 (1934)). We do not think, for instance, that it is evident what constitutes a "flood" or "floodwaters."[6] Nor is the word "damage" quite unequivocal.[7] Nor, indeed, is it clear why "at any place" was tacked on to the sentence, inasmuch as the immunity language is already comprehensive without it.[8]

---

when it received the approval of this body." 69 Cong.Rec. 8187 (1928) (statement of Sen. King).

Indeed, the specific language of section 702c was considered ambiguous, inasmuch as "the latter part of the last paragraph of the section [i.e., the proviso] [was inserted] so as to clarify the meaning." 69 Cong.Rec. 8119 (1928).

[6] "Floodwaters" is not an easy word to define. It could readily be defined as "waters that are out of control." Or it might be more broadly defined as "water at a flood control project." We need not endorse either definition here, inasmuch as we assume that the waters in this case were floodwaters. "Flood" has been defined as water that inundates an area of the surface of the earth where it ordinarily would not be expected. *Stover v. United States*, 204 F.Supp. 477, 485 (N.D. Cal. 1962), *aff'd*, 332 F.2d 204 (9th Cir.), *cert. denied*, 379 U.S. 922, 85 S.Ct. 276, 13 L.Ed.2d 335 (1964).

[7] Does this word imply damage to land as opposed to injury to the person? Although the distinction has never been observed with a great deal of fastidiousness, we note the modern predilection to refer to *injury* to the person, and *damage* to property. *E.g.*, P. Keeton & R. Keeton, *Law of Torts* 136 (2d ed. 1971) ("physical damage to property and physical injury to the person."). No court of appeals has applied § 702c to immunize the government from liability for personal injury or death. *See infra* note 16.

[8] It may be argued that *at any place* was intended to modify either *damage* or *floods*; hence either *damage at any place* or *floods at any place* would be the basic phrase. If the intent

Nevertheless, section 702c is understandable and explicable as a statement of the precise issue before Congress: the allocation of costs of the project at hand. The correctness of this explanation of the statutory language is demonstrable on four grounds. First, in the congressional debates "liability" and "damage(s)" were repeatedly used in reference to these costs. Second, the proviso of section 702c—the language immediately following the disclaimer—apportions costs in the event of inundated and overflowed lands due to levees having been impracticable; again, this specific language, inserted by the drafters to clarify the meaning, is concerned with the allocation of costs. Third, the section 702c immunity replaced what in previous versions had been Senate largess; the immunity was a legislative answer on the controversial issue of whether the federal government or other entities would absorb the general costs of the project. And fourth, the legislative history is replete with references to damaged land, strongly suggesting the conclusion that the phrase "at any place" was intended to be read as if it were "to any place," hence the phrase interpreted in full: "damage by floods to any place."

If, however, we make section 702c into a disclaimer of liability for consequential damages of a different nature, we create serious contextual or external ambiguities, and risk construing the statute within its letter, but beyond its intent.[9] The statute does not de-

---

was not to be so locative as descriptive of what sustains damage, the true effect of the phrase was to exclude the liability for *damage to any place*.

[9] "It is a 'familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within the spirit nor within the intention of its makers.'"

fine the nature of the relation between the floodwaters and flood control projects on the one hand, and the activities of the United States on the other. For example, is the government invariably immune from damage attributable to floodwaters? Let us suppose that park personnel negligently divert the course of a stream onto a campground, and subsequently a flood destroys the camp. Would the immunity obtain? Perhaps so, if we ignored all the statutory language other than the one-sentence disclaimer of liability, ignored the legislative history, and ignored the underlying purpose of the statute.[10] Yet precedent stands against immunity. *Graci v. United States*, 456 F.2d 20 (5th Cir.1971) (claim not barred where plaintiffs have alleged floodwater damage resulting from governmental negligence unconnected with any flood control project); *Peterson v. United States*, 367 F.2d 271 (9th Cir.1966) (government may be liable for negligence where the project was wholly unrelated to flood control); *see Seaboard Coast Line Railroad v. United States*, 473 F.2d 714 (5th Cir.1973); *Flor-*

United Steelworkers v. Weber, 443 U.S. 193, 201, 99 S.Ct. 2721, 2726, 61 L.Ed.2d 480, 488 (1979) (quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892)).

[10] "The decisions of [the Supreme] Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, for 'literalness may strangle meaning.'" *Lynch v. Overholser*, 369 U.S. 705, 710, 82 S.Ct. 1063, 1067, 8 L.Ed.2d 211, 215 (1962) (citation omitted) (quoting *Utah Junk Co. v. Porter*, 328 U.S. 39, 44, 66 S.Ct. 889, 892, 90 L.Ed. 1071, 1074 (1946)). Those who work with words must rise above the "tyranny of literalness." *United States v. Witkovich*, 353 U.S. 194, 199, 77 S.Ct. 779, 782, 1 L.Ed.2d 765, 769 (1957).

ida East Coast Railway v. United States, 519 F.2d 1184, 1191 (5th Cir.1975).

Other ambiguities in application complicate the analysis. For instance, must the water be floodwater, or is it enough that waters at a normal level are managed for flood control purposes? This question arises when government employees negligently release waters impounded from normal flowage. If we equate the impoundment of near-normal waters for flood control purposes with actual floodwaters, we could not uphold the immunity provision if the impounded water amounted to a taking of the covered land.[11] Here again, the provision proves to be less than absolute.

A third interpretative problem crops up when the damage *is* from floodwater at a flood control project, but the floodwater is only a condition that is incidental to the governmental fault. Thus we might have an air traffic controller's negligence causing a plane to crash into a flood control lake. Or a government driver negligently placing a handicapped person where the latter is subsequently unable to escape raging waters. Or a steep boat launch into a flood control reservoir left unmarked, so deceiving a driver that he thinks he is traveling a through road until he plunges into the lake. The bald language of the immunization might suggest no government liability.

To handle the problems presented by these ambiguities, it is necessary to understand what it was

[11] There has never been a question but that damages from governmentally induced floods that result in a taking in derogation of Fifth Amendment rights are compensable. *See, e.g., United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 70 S.Ct. 885, 94 L.Ed. 1277 (1950); *United States v. Cress*, 243 U.S. 316, 37 S.Ct. 380, 61 L.Ed. 746 (1917).

that Congress wanted to achieve with this language. We recognize, of course, that a statute governs all the circumstances falling within its purview, not just those which prompted its enactment. The problem lies in delimiting that purview, to which purpose we examine both the statutory language and the historical problems at which it was aimed;[12] and from this examination we arrive at the overarching purpose of the legislation. Our duty is " 'to find that interpretation which can most fairly be said to be embedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.' " *Commissioner v. Engle*, 464 U.S. 206, ——, 104 S.Ct. 597, 604, 78 L.Ed.2d 420, 429 (1984) (quoting *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297, 77 S.Ct. 330, 338, 1 L.Ed.2d 331, 342 (1957) (Frankfurter, J., concurring in part and dissenting in part)).

III. THE GOVERNMENTAL IMMUNITY IN CONTEXT

When this court seeks to learn congressional intent by examining the legislative history of a statute, "we look to the purpose the original enactment served, the discussion of statutory meaning in committee reports, the effect of amendments—whether accepted or re-

[12] In delimiting the purview of the statute, we have "some scope for adopting a restricted rather than a literal or usual meaning of [the statute's] words where acceptance of that meaning would lead to absurd results . . . . But it is otherwise where no such consequences would follow and where . . . it appears to be consonant with the purposes of the Act." *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643, 98 S.Ct. 2053, 2061, 56 L.Ed.2d 591, 601 (1978) (quotation marks omitted).

jected—and the remarks in debate preceding passage." *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1080 (5th Cir.), *cert. denied*, 449 U.S. 889, 101 S.Ct. 246, 66 L.Ed.2d 115 (1980). The legislative history of the 1928 statute reveals that Congress was concerned with allocating the costs of a major public works program between the federal government and the state and local interests, both public and private, in the wake of a financial, administrative, and engineering debacle. In addition to the construction work itself, these costs or "damages" included acquisition of property rights for levees and diversion channels, where water would flow at normal as well as at flood stages, and the relocation of roads and other facilities.

In 1928 flood control was "the greatest question . . . before the American Congress." 69 Cong.Rec. 5294 (1928) (statement of Sen. Reed). Nearly a year had passed since the waters of the Mississippi had swollen uncontrollably and violently deluged the Mississippi Valley, with a direct loss of nearly 200 lives and more than $200,000,000 in property damage; 700,000 people were left temporarily homeless. S. Rep. No. 619, 70th Cong., 1st Sess. 12 (1928). Hundreds of pages of the Congressional Record are devoted to one pressing question: what could Congress do to ameliorate the effects of subsequent floods, which would be, of course, inevitable?

The inquiry was not a new one; nor indeed was it as controversial as the ancillary issue of who was to pay for this large-scale undertaking. The recurrence of floods in the alluvial valley of the Mississippi had prompted the United States, in conjunction with state and local governments, to build a network of flood control levees, under a project known as the Eads Plan, as far back as 1883. *See United States*

v. Sponenbarger, 308 U.S. 256, 261, 60 S.Ct. 225, 226-27, 84 L.Ed. 230, 235 (1939). The Mississippi River Commission planned and executed the project, following a policy of building "levees only" and of closing every outlet on the river except one. H.R.Rep. No. 1072, 70th Cong., 1st Sess. 5 (1928). Almost a half billion dollars went into the project over a period of more than forty years. *Id.*

Yet the Eads Plan had proved inadequate when the disastrous torrent of 1927 deluged the lower Mississippi Valley. The policy of having constructed only levees was seen as a monumental blunder that had caused great loss of life, and the Mississippi River Commission was discredited. H.R.Rep. No. 1072, 70th Cong., 1st Sess. 7 (1928). One congressman stated in 1928:

> Many millions of dollars have been spent in an effort to control floods in the Mississippi Valley. Most of the work has been worse than wasted, for it has done much harm instead of good. . . . We have spent many millions of dollars to build levees; that is, great embankments alongside of and a little distance from the natural banks of the river, and the result has been that every flood has been more disastrous than the floods which preceded it.

69 Cong.Rec. 7011 (1928) (statement of Rep. Crosser). Congress moved quickly to establish a new flood control plan of a magnitude never undertaken before. Most of the hundreds of pages devoted to flood control in the 1928 Congressional Record reflect the concern of apportioning costs.

The Mississippi River Commission and the Secretary of War both submitted flood control proposals

› Congress. The Senate originally endorsed the Jadwin Plan, submitted by the Chief of Engineers for the Secretary of War. This plan would have required local interests to provide all the rights of way for flood control projects; the estimated cost to the federal government was $296,400,000 over ten years. S.Rep. No. 619, 70th Cong., 1st Sess. 11 (1928). The Jadwin Plan as initially adopted by the Senate was extremely generous:

> Just compensation shall be paid by the United States for all property used, taken, *damaged*, or destroyed in carrying out the flood control plan provided for herein, including all property located within the area of the spillways, flood ways, or diversion channels herein provided, and all rights of way thereover, and the flowage rights thereon, and *also including all expenditures by persons, corporations, and public service corporations made necessary to adjust or conform their property, or to relocate same because of the spillways, flood ways, or diversion channels herein provided.*

S. 3740, 70th Cong., 1st Sess. 54, 69 Cong. Rec. 5483 (1928) (emphasis added). The original House version of the Act also authorized the United States to "pay just compensation for all rights of way and damages, *including expenses to railroads or others in changing their property.*" H.R.Rep. No. 1100, 70th Cong., 1st Sess. 12 (1928) (emphasis added). Both the House and Senate versions required that title to the lands be turned over to the states. *Id.* at 5. In the end, however, this federal beneficence was supplanted by a disclaimer of any liability for "damage . . . at any place." 33 U.S.C. § 702c. The

key to the immunity clause of section 702c lies in the debates over the extent to which the United States should bear these costs.

The legislation was intermittently debated in Congress from February 1928 until May 15, 1928, when the final bill was enacted. As late as April 23, Congressman La Guardia told his colleagues in the House of Representatives, "There is no one who contends that property that is damaged by the work of the Government should not be paid for." 69 Cong.Rec. 7002 (1928). In that same discussion, Congressman Cox inquired of Congressman Frear whether "he favor[ed] the taking or damaging of private property for public use without just compensation," to which Congressman Frear replied, "I believe if this land is damaged beyond what it has been under the original overflowing of these flood ways, the Government should pay for that damage." *Id.* at 7000.

On the same day, the language that now begins section 702c was first proposed by Congressman Reid, Chairman of the House Flood Control Committee. *See* 69 Cong.Rec. 7022, 7028 (1928). Little was said of it directly, aside from the acknowledgment of its seeming redundancy, in the light of the existing sovereign immunity: "While it is wise to insert that provision in the bill, it is not necessary, because the Supreme Court of the United States has decided, as you have heard reiterated many times during the discussion of this bill, that the Government is not liable for any of these damages." [13] 69

---

[13] *See supra* note 11. Congressman Cox even read to the House of Representatives portions of several cases dealing with sovereign immunity and with constitutional takings, among them *Bedford v. United States*, 192 U.S. 217, 24 S.Ct. 238, 48 L.Ed. 414 (1903) (damages to lands by flooding as the

Cong.Rec. 7028 (1928) (statement of Rep. Spearing). The question of course arises, if the immunity clause was *unnecessary*, then why might it have been *wise?* It may have been wise—at least the framers considered it so—inasmuch as it declared in advance what part of the expenses of this project the United States was to pay. That was to be what items Congress specified and nothing more.

> Those who prepared the amendment were careful to clothe it with every possible provision to make the city of New Orleans liable to third persons; that is, persons other than the Federal Government. . . . [T]hey enlarged the [local] obligation so as to include all damage claims arising out of the construction of the spillway, not merely those against the Government or for which the Government might be liable.

Id.[14]

---

result of revetments erected by the United States along the banks of the Mississippi River to prevent erosion of the banks from natural causes are consequential and do not constitute a taking of the land flooded within the meaning of the Fifth Amendment); and *Northern Transp. Co. v. City of Chicago*, 99 U.S. 635, 25 L.Ed. 336 (1978) (no action will lie for damages consequent to the erection of public improvements). 69 Cong.Rec. 7106 (1928) (statement of Rep. Cox).

The legislative history reveals that Congress was concerned not only with takings, but also with other property damages that would directly or indirectly result from the flood plan. Moreover, with regard to these costs the question was not *whether* government would compensate for private damages and expenses (although some would intentionally be made to be absorbed by corporations and individuals), but *which* government would pay: federal or state and local.

[14] We heed the Supreme Court's admonition that "[o]ral testimony of witnesses and individual Congressmen, unless

More important, however, the disclaimer of liability must be read as a direct negation or repudiation of the provision it superseded, which would have provided munificence to those whose property was affected. The earlier provision, it must be remembered, would have authorized the United States to "pay just compensation for all rights of way and damages, including to railroads or states in changing their property." H.R. Rep. No. 1100, 70th Cong., 1st Sess 12 (1928). This version had been attacked on April 18 as "contain[ing] vicious provisions," 69 Cong. Rec. 6712 (1928) (statement of Rep. Kopp), because it might subject the government to prodigious liabilities. Congressman Kopp suggested that the provision had "originated in some railroad office," because it "[gave] the railroads in the Mississippi Valley an unfair and unjust advantage." *Id.* With these mounting criticisms, and a President who had adopted a less munificent approach for the federal government,[15] the

---

very precisely directed to the intended meaning of particular words in a statute, can seldom be expected to be as precise as the enacted language itself." *Regan v. Wald*, —— U.S. ——, ——, 104 S.Ct. 3026, 3036, 82 L.Ed.2d 171, 183 (1984). Our use of language in the debates falls clearly within the Supreme Court's "unless . . ." clause, for the language quoted *is* precisely directed to the intended meaning of particular statutory words.

[15] In a message to Congress, President Coolidge stated that it was 'axiomatic that states and other local authorities should supply all land and assume all pecuniary responsibility for damages that may result from the execution of the project." S.Rep. No. 619, 70th Cong., 1st Sess. 11 (1928). One of the most outspoken opponents of federal largess invoked the president's stand in the congressional debates:

> Flood control bills now pending before Congress appear to President Coolidge ideally suited to benefit everybody

provision was changed to read as it now does. Legislative language is often placed in statutes for the sake of legislators (to obtain their votes, perhaps) as well as for courts; this seems clearly to be such an instance.

Congress decided that, with the narrow exceptions stated in the Act (construction costs, rights of way, and constitutional takings), the United States Government was not to pay the cost for floodwater inundation or damage. It seems likely th[illegible] the disclaimer of immunity was directed solely at flooding; Congress shifted most of the risks and costs connected with flooding onto local entities and private owners, or both. It seems doubtful that Congress intended to shield the negligent or wrongful acts of government

---

except the actual flood sufferers whom they were originally intended to protect. Railroad companies, lumber interests, individuals holding shares in these concerns, and especially contractors interested in the constructions involved, seem to the President destined to derive majority benefits from the contemplated measures. All in all, he thinks the situation now in Congress is impossible.

Large sums, which some of the experts whom President Coolidge has consulted have estimated as high as $1,500,000,000 will be expended under the bill to buy rights of way, channels for the flood way and contingent expenses, including major maintenance costs.

The letting of contracts for the actual construction would be taken out of the hands of Army engineers, where it has heretofore always rested, to become the jurisdiction of the special commission formed under the provisions of the bill.

* * * *

He regards such a policy as equivalent to bestowing very definite favors upon certain communities at the expense of the remainder of the country.

69 Cong.Rec. 6661 (1928) (statement of Rep. Frear).

employees—either in the construction or in the continued operation of the Mississippi plan.[16]

---

[16] It is even less likely that Congress was immunizing the government from liability for personal injuries apart from pure property costs—only the latter having been discussed in debates. The statutory language itself suggests this construction. It is elementary that the statutory provision is properly read as a whole. The immunity provision is only the first clause of a very long sentence, which continues in part: "*Provided, however,* that if . . . lands in [a] stretch of river are subjected to overflow and damage which are not overflowed or damaged by reason of the construction of levees . . ., the [Government shall] acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands." 33 U.S.C. § 702c (1982) (emphasis in original). In juxtaposing the disclaimer and the proviso, we hark to the maximum *noscitur a sociis* (literally, "it is known from its associates"), which "acknowledges what general and specific words are associated with and take color from each other, restricting general words to a sense analogous [and] less general." *Owen of Georgia, Inc. v. Shelby County,* 648 F.2d 1084, 1092 (6th Cir. 1981). This is a statute about damage to lands, not about people who are hurt or killed. This view is heightened by the fact that the House inserted "the latter part of the last paragraph of the section [i.e., the proviso] so as to clarify the meaning." 69 Cong.Rec. 8119 (1928).

Of the twenty-three federal appellate cases directly construing and applying the immunity provision, twenty-one were brought to recover for damage to property. *See Portis v. Folk Constr. Co.,* 694 F.2d 520 (8th Cir. 1982) (damage to crops and land); *Morici Corp. v. United States,* 681 F.2d 645 (9th Cir. 1982) (damage to corn crop); *Pierce v. United States,* 650 F.2d 202 (9th Cir. 1981) (damage to land); *Aetna Ins. Co. v. United States,* 628 F.2d 1201 (9th Cir. 1980) (damage of unspecified nature; no district court opinion reported; inferentially property damage), *cert. denied,* 450 U.S. 1025, 101 S.Ct. 1732, 68 L.Ed.2d 220 (1981); *Burlison v. United States,* 627 F.2d 119 (8th Cir. 1980) (damage to land and crops),

cert. denied, 450 U.S. 1030, 101 S.Ct. 1740, 68 L.Ed.2d 225 (1981); *Taylor v. United States*, 590 F.2d 263 (8th Cir. 1979) (damage to property); *Lenoir v. Porters Creek Watershed Dist.*, 586 F.2d 1081 (6th Cir. 1978) (damage to land); *Hayes v. United States*, 585 F.2d 701 (4th Cir. 1978) (erosion and property damage); *Miller v. United States*, 583 F.2d 857 (6th Cir. 1978) (loss of 6,000 square feet of lakefront land); *Callaway v. United States*, 568 F.2d 684 (10th Cir. 1978) (damage to crops and property); *Florida East Coast Ry. v. United States*, 519 F.2d 1184 (5th Cir. 1975) (damage to railroad); *Graci v. United States*, 456 F.2d 20 (5th Cir. 1971) (damage to property); *National By-Products, Inc. v. United States*, 405 F.2d 1256, 186 Ct.Cl. 546 (1969) (damage to property); *McClaskey v. United States*, 386 F.2d 807 (9th Cir. 1967) (damage to motel property); *Amino Bros. Co. v. United States*, 372 F.2d 485, 178 Ct.Cl. 515 (damage to property), *cert. denied*, 389 U.S. 846, 88 S.Ct. 98, 19 L.Ed.2d 112 (1967); *Parks v. United States*, 370 F.2d 92 (2d Cir. 1966) (damage to property); *Peterson v. United States*, 367 F.2d 271 (9th Cir. 1966) (damage to and loss of property); *Stover v. United States*, 332 F.2d 204 (9th Cir.) (damage to land), *cert. denied*, 379 U.S. 922, 85 S.Ct. 276, 13 L.Ed.2d 335 (1964); *Tillman v. United States*, 232 F.2d 511 (9th Cir.) (property damage), *cert. denied*, 352 U.S. 842, 77 S.Ct. 66, 1 L.Ed.2d 58 (1956); *Clark v. United States*, 218 F.2d 446 (9th Cir. 1954) (damage to property); *National Mfg. Co. v. United States*, 210 F.2d 263 (8th Cir.) (property loss and damage), *cert. denied*, 347 U.S. 967, 74 S.Ct. 778, 98 L.Ed. 1108 (1954).

The two others do not immunize the government from personal injury liability. In *Wright v. United States*, 568 F.2d 153 (10th Cir. 1977), *cert. denied*, 439 U.S. 824, 99 S.Ct. 94, 58 L.Ed.2d 117 (1978), brought as a wrongful death action under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (1982), after a bridge collapsed, the United States asserted § 702c as a defense, but the court held the government immune on other grounds. 568 F.2d at 155. Similarly, in *Lunsford v. United States*, 570 F.2d 221 (8th Cir. 1977), an action for damage to property and personal injury (including death), the court abstained from deciding the § 702c question: "We agree that the defense [i.e., the governmental immunity] should remain but we do so without reaching the question of the scope of immunity under § 702c on the merits." 570 F.2d at 229. The *Lunsford* court made no distinction between damage to property and injury to persons.

IV. HISTORICAL INTERPRETATION OF THE SCOPE OF THE PROVISION

A. Broad-brush Interpretations

In interpreting the immunity provision, most courts have cited only the general disclaimer stating that no liability shall attach for any flood damage at any place.[17] By reviewing only this portion of section 702c, the courts have construed it to grant immunity in the "broadest and most emphatic language." [18]

In *National Mfg. Co. v. United States*, 210 F.2d 263, 271 (8th Cir.), *cert. denied*, 347 U.S. 967, 74 S.Ct. 778, 98 L.Ed. 1108 (1954), the first case to deal extensively with section 702c, the court interpreted the language to provide absolute immunity to the government for any negligence related to floods or flooding. In that case, owners of property along the Kansas River sued the United States for failing to warn of a flood that damaged their property. The Eighth Circuit stated:

[17] *E.g.*, *National Mfg. Co.*, 210 F.2d at 270; *see Burlison v. United States*, 627 F.2d 119, 121 (8th Cir. 1980); *cert. denied*, 450 U.S. 1030, 101 S.Ct. 1740, 68 L.Ed.2d 225 (1981); *Lunsford v. United States*, 570 F.2d 221, 227 (8th Cir. 1977); *Stover v. United States*, 332 F.2d 204, 205 n. 1 (9th Cir.), *cert. denied*, 379 U.S. 922, 85 S.Ct. 276, 13 L.Ed.2d 335 (1964).

[18] *National Mfg. Co.*, 210 F.2d at 270; *see also Morici Corp. v. United States*, 681 F.2d 645, 647 (9th Cir. 1982); *Florida East Coast Ry. v. United States*, 519 F.2d 1184, 1192 (5th Cir. 1975); *McClaskey v. United States*, 386 F.2d 807, 808 (9th Cir. 1967).

> Section [702c] plainly bars recovery against the United States. The section does not limit the bar against such recovery where floods or flood waters are the sole cause of damages. It does bar liability of any kind from damages "by" floods or flood waters but it goes further and in addition it bars liability for damages that result (even directly) "from" floods. The use of the word "from" in addition to "by" makes it clear that the bar against federal liability for damages is made to apply wherever floods or flood waters have been substantial and material factors in destroying or damaging property. The language used shows Congressional anticipation that it will be claimed after the happening of floods that negligence of government employees was a proximate cause of damages where floods or floodwaters have destroyed or damaged goods. But the section prohibits government liability of "any kind" and at "any place." So that uniformly and throughout the country at any place where there is damage "from" or "by" a flood or flood waters in spite of and notwithstanding federal flood control works no liability of any kind may attach to or rest upon the United States therefor.

Id. at 271. The complaint in that case was not directed at government employees engaged in flood control construction, but was confined to flood forecasters. *Id.* at 275. The court in part justified the result on grounds of public policy rather than on a legislative grant of immunity. *Id.* at 274. Nonetheless, *National Mfg.* absolved the United States of all liability from any damage resulting from floods on the basis of section 702c.

Three circuits have adhered closely to the expansive reading of section 702c in *National Mfg.* In *Callaway v. United States*, 568 F.2d 684, 687 (10th Cir. 1978), the Tenth Circuit stated: "We can conceive of no set of facts appellants could prove in support of their claims for which recovery would not be barred by 33 U.S.C. § 702c." The substance of *National Mfg.* has been followed only by the Eighth Circuit,[19] the Tenth Circuit (in *Callaway*), and the Second Circuit [20] without some judicial attrition of the immunity's absoluteness.

Our legislative analysis does not bear out the construction that *National Mfg.* gave the immunity provision. Perhaps " 'the immunity from liability for floodwater damage arising in connection with flood control works was the condition upon which the government decided to enter into the area of . . . flood control programs.' " [21] But "it is simply impossible 'to accept this immunity provision, reasonably re-

---

[19] *See Portis v. Folk Constr. Co.*, 694 F.2d 520 (8th Cir. 1982); *Burlison v. United States*, 627 F.2d 119 (8th Cir.1980), *cert. denied*, 450 U.S. 1030, 101 S.Ct. 1740, 68 L.Ed.2d 225 (1981); *Taylor v. United States*, 590 F.2d 263, 267 (8th Cir. 1979) ("[S]ection 702c bars liability for damages that result (even indirectly) from floods." (quotation marks omitted)). *But see Lunsford v. United States*, 570 F.2d 221 (8th Cir. 1977) (citing the conflict between *National Mfg.* and *Peterson v. United States*, 367 F.2d 271 (9th Cir.1966), and refusing to endorse either the wholesale immunity, on the one hand, or the "wholly unrelated" doctrine, on the other, without the benefit of a full record).

[20] *Parks v. United States*, 370 F.2d 92 (2d Cir.1966).

[21] *Graci v. United States*, 456 F.2d 20, 26 (5th Cir.1971) (quoting the opinion below, 301 F.Supp. 947, 952 (E.D.La. 1969)).

lated to government involvement in flood control programs, as an absolute insulation from liability for all wrongful acts in other situations.' " [22]

The apparent illegitimacy of the broad-brush interpretation is heightened by an examination of the 1936 National Flood Control Act, 33 U.S.C. §§ 701a-701u (1982). Eight years after the Mississippi Flood Control Act, Congress addressed the issue for nationwide coverage. Yet Congress did not repeat or re-enact [23] section 702c, or say anything about conse-

---

[22] *Id.* at 27 (quoting the opinion below, 301 F.Supp. 947, 954 (E.D.La.1969)).

[23] Courts that have previously considered the question have somehow been persuaded that the 1936 National Flood Control Act did re-enact section 702c. This line of holdings began with *National Mfg. Co. v. United States*, 210 F.2d 263, 270 (8th Cir.), *cert. denied*, 347 U.S. 967, 74 S.Ct. 778, 98 L.Ed. 1108 (1954), in which the court paraphrased 33 U.S.C. § 701e:

> Nothing in this Act shall be construed as repealing or amending any provisions of the Act entitled 'An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes,' approved May 15, 1928, or any provision of any law amendatory thereof.

We cannot see how refraining from repealing or amending a statute dealing with the Mississippi River and its tributaries in any way re-enacts all the provisions of the prior statute into the later one. Yet the *National Mfg.* court, using the above quotation, wrote: "Congress . . . affirmed the application to the 1936 Act of the general provision of the 1928 Act, including [§ 702c]." 210 F.2d at 270. Other courts have relied largely on this enigmatic analysis.

The 1936 Act has its own immunity provision in 33 U.S.C. § 701c (1982), which has remained unamended. This disclaimer might be read as fulfilling the same legislative intent as that in the 1928 statute, but as being much more specific and comprehensive in revealing that intent:

> [N]o money appropriated under authority of section 701f of this title shall be expended on the construction of any project until States, political subdivisions thereof, or other responsible local agencies have given assurances satisfactory to the Secretary of the Army that they will . . . hold and save the United States free from damages due to the construction works.

33 U.S.C. § 701c(b) (1982).

Congress would have been unlikely to place two governmental immunity provisions in the same statute. To read § 702c of the 1928 Act into the 1936 Act makes § 701c(b) redundant; the Supreme Court disapproves of such readings. *Singer v. United States*, 323 U.S. 338, 344, 65 S.Ct. 282, 285, 89 L.Ed. 285, 290 (1945). Furthermore, Congress in 1936 could have expressly adopted the § 702c disclaimer, but it did not.

quential damages. As in 1928, Congress was much concerned with the allocation of costs, and the specific disclaimer of liability in the act reflects this concern. In 1946, Congress again contemplated at length sovereign immunity when the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (1982), was enacted, but it made no exception for flood control or floodwaters.

We are aware, of course, that " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 117, 100 S.Ct. 2051, 2061, 64 L.Ed.2d 766, 778 (1980) (quoting *United States v. Price*, 361 U.S. 304, 313, 80 S.Ct. 326, 332, 4 L.Ed.2d 334, 340 (1960)). Yet "[w]hile arguments predicated upon subsequent congressional actions must be weighed with extreme care, they should not be rejected out of hand as a source that a court may consider in the search for legislative intent." *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8, 100 S.Ct. 1932, 1938 n.8, 64 L.Ed.2d 593, 601 n.8 (1980).

In *GTE Sylvania*, the Court observed that "subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to enactment." 447 U.S. at 118 n.13, 100 S.Ct. at 2061 n. 13, 64 L.Ed. 2d at 778 n.13. We are not, however, overriding the legislative history of the 1928 Act with that of the 1926 Act; rather, we are reinforcing that intent. If we override anything, it is but a judicial misconstruction compounded through the years. Our "first duty in construing the statute is to effectuate the express intent of the Congress." *Adams v. Morton*, 581 F.2d 1314, 1320 (9th Cir. 1978), *cert. denied*, 440 U.S. 958, 99 S.Ct. 1498, 59 L.Ed.2d 771 (1979). The notion that section 702c shielded the United States Government from all liability so that floods could be controlled is an idea Congress never sanctioned. It was the creation of the courts, beginning in 1954.

B. Limitations on the Immunity

Some courts have wisely retreated from the absolutist stance, recognizing that "[r]esort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes." [24] *Markham v. Cabell*, 326 U.S. 404, 409, 66 S.Ct. 193, 195, 90 L.Ed. 165, 168 (1945). This court, for example, has declined to construe section 702c as a wholesale immunity provision. If the flooding is unconnected with flood control projects, the United States may be

[24] Shakespeare, aptly using flooding as the metaphor, made virtually the same point about the overbroad remedy for a specific problem: "What need to bridge much broader than the flood?/ The fairest grant is the necessity./ Look what will serve is fit." W. Shakespeare, *Much Ado About Nothing*, I, i. 316-18.

subject to liability. *Graci v. United States*, 456 F.2d 20, 27 (5th Cir. 1971). Hence, where the government's construction of a navigation project diverted floodwater to plaintiff's property, its actions did not come within the grant of immunity under section 702c. *Id.* Similarly, the Ninth Circuit has held that section 702c does not bar liability when the governmental action was wholly unrelated to any act of Congress authorizing expenditures of federal funds for flood control. *See Peterson v. United States*, 367 F.2d 271, 276 (9th Cir. 1966) (no immunity for dynamiting ice jam which resulted in flooding of properties downstream).[25]

The Fourth Circuit, rightly we believe, restricted the immunity more closely to the limited purpose of the statute: to management of the water only if the purpose of flood control is thereby served. *Hayes v. United States*, 585 F.2d 701 (4th Cir. 1978). Under this rationale, section 702c shields the government from liability only for damage due to the floodwaters or to fault in the management of floodwaters, either in the planning or in the execution of the flood control project, and only when flood control purposes underlie the conduct faulted.

C. Recreational Use and the Duty to Warn

We are persuaded that the limitations on the immunity should be elaborated more particularly. The government is not liable for any fault of its employees in controlling floodgates or managing lands to con-

[25] This "wholly unrelated" doctrine has subsequently been applied in *Morici Corp. v. United States*, 681 F.2d 645 (9th Cir.1982), and in *Lunsford v. United States*, 570 F.2d 221, 229 (8th Cir.1977).

tain, prevent, or manage floods or floodwaters. This immunity, however, does not extend to the fault of government employees in failing to warn the public of the existence of hazards to their accepted use of government-impounded water, or nearby land. Because of section 702c, the government's acts to store, divert, and release waters to further flood control are subject to no risk of liability. If, however, the government allows people to come upon those waters or nearby shores for purposes of recreation, section 702c grants no immunity for government fault in creating a danger or in failing to warn of danger to the public. If a producing cause of the damage or injury is a government employee's negligence in omissions or commissions that diverge from acts strictly for the purpose of controlling floods or floodwaters, and the presence or movement of water for flood control purposes merely furnishes a condition of the accident, there is no section 702c immunity.

V. THE CASES ON APPEAL

A. Appellants Butler and James

The Millwood Reservoir was dedicated in 1966, and since that time has served a variety of purposes, both recreational and flood control related. It is owned by the United States and operated by the Army Corps of Engineers. The United States Government Printing Office has printed brochures touting the recreational attractiveness of the Millwood Reservoir. The government, through these brochures, encourages its citizens to fish and hunt, to water-ski, and to sightsee at this project.

The trial court found that, on the day of the accident, water was being discharged at the Millwood Dam at the rate of 24,000 cubic feet per second. The

Army Corps of Engineers was discharging water impounded for flood control purposes. The court below found that the five red-and-white warning buoys normally in front of the dam structure were not in their proper places. A second string of orange buoys had also been displaced. Thus recreational users of the reservoir had no warning of the precipitate discharge.

The court further found that the government had actual knowledge that these warning buoys were missing, and that boaters and skiers might be injured, but nonetheless failed to take corrective measures. Judge Parker concluded that "[t]he facts of this case constitute a classic example of death and injuries resulting from conscious governmental indifference to the safety of the public. This case goes beyond gross negligence." We believe it would be as irrational as it would be unnecessary to hold that such conduct falls within what Congress intended to protect by the enactment of section 702c.[28]

B. Appellant Clardy

The court below dismissed this case by summary judgment, on the ground that the water discharge that created the dangerous current was for the purpose of flood control. The conceded fact that the waters released had been impounded for flood control purposes was thought to dispose of the case. On remand, Clardy will be able to develop facts with regard to use of the bayou, adequacy of any warnings, and any other government negligence.

---

[28] We mark the Supreme Court's pronouncement that "[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71, 102 S.Ct. 1534, 1538, 71 L.Ed.2d 748, 756-57 (1982).

VI. CONCLUSION

We have concluded that the governmental immunity provided by 33 U.S.C. § 702c (1982) does not extend to the fault of government employees who fail to warn the public of the existence of hazards to the accepted use of governmentally impounded water. Hence the plaintiffs in these cases are not barred from bringing suit. We REVERSE judgment in *James v. United States*, No. 83-2276, and REMAND for entry of judgment consistent with this opinion. We REVERSE the summary judgment in *Clardy v. United States*, No. 83-4522, and REMAND for further proceedings.

GEE, Circuit Judge, with whom GARWOOD, E. GRADY JOLLY, W. EUGENE DAVIS and ROBERT MADDEN HILL, Circuit Judges, join, dissenting:

The majority opinion seeks to make a case for the proposition that in enacting § 702c the Congress did not mean what until today every court that has considered its language has concluded it meant to say. It said:

> *No* liability of *any* kind shall attach to or rest upon the United States for *any* damage from or by floods or flood waters *at any place:* . . . . 33 U.S.C. 702(c) (emphasis added).

The majority finds ambiguity, ambiguity which it candidly characterizes as "latent" (Slip Op. at 4314, at ——), in these words. The occasion for doing so is an appealing one: innocent citizens have been damaged in their lives, bodies and prospects by reason of thoughtless, perhaps callous, conduct by government employees.

Looking at the statute, I have sought to devise a form of words that would more plainly rule out liability than does the Congressional language, hopeful that a comparison of what Congress said with what it might have said would reveal some distinction that would permit me to join the Court. I give it, with my additions in brackets:

> No liability of any kind [whatsoever, either to person, realty or intangible property,] shall attach to or rest upon the United States for any [consequential] damage [or injury whatever, however occasioned,] from or by [, in whole or in part, or in any manner connected with,]

> floods or flood waters [, whether stored or running free], at any place . . . .

Having done so, I find that what appears in brackets serves small purpose beyond making the enactment read like an insurance company's form general release rather than a statute. Such releases are designed to be "court-proof." I doubt, however, that even such a redundant form of words as I have imagined would be proof against the approach of the majority, which finds ambiguity even in such terms as "damage" and "flood waters" and visits liability upon the United States for damage resulting, in each of today's cases, from negligence plainly associated with a flood control activity—the release of stored floodwaters. Its holding is thus in the teeth of the statute's plain words and, insofar as I can understand the holding, simply brushes them aside and substitutes for them the court's notions of good policy.

I am not, however, sure what it is that the court holds today, although the effect in the cases is tolerably clear. The court's summation of its decision appears at (Slip Op. at 4324, at ——):

> *Recreational Use and the Duty to Warn*
>
> We are persuaded that the limitations on the immunity should be elaborated more particularly. The government is not liable for any fault of its employees in controlling floodgates or managing lands to contain, prevent, or manage floods or floodwaters. This immunity, however, does not extend to the fault of government employees in failing to warn the public of the existence of hazards to their accepted use of government-impounded water, or nearby land. Because of

> section 702c, the government's acts to store, divert, and release waters to further flood control are subject to no risk of liability. If, however, the government allows people to come upon those waters or nearby shores for purposes of recreation, section 702c grants no immunity for government fault in creating a danger or in failing to warn of danger to the public. If a producing cause of the damage or injury is a government employee's negligence in omissions or commissions that diverge from acts strictly for the purpose of controlling floods or floodwaters, and the presence or movement of water for flood control purposes merely furnishes a condition of the accident, there is no section 702c immunity.

The quoted passage seems to me a classic exercise in granting with one hand and taking away with the other. Midway through its holding, the court intones that "Because of section 702c, the government's acts to store, divert, and *release* [as it was doing in these cases] waters to further flood control are subject to *no risk* of liability (emphasis added)." Since that was what the government was unquestionably doing here, these appeals fail and the appellants take nothing—right?

Wrong: "*If*, however, the government allows people to come upon those waters or nearby shores for purposes of recreation, section 702c grants *no* immunity for government fault in creating a danger *or* failing to warn of danger to the public." (emphasis added). Taking these passages together, and attempting to construe them together as carefully and charitably as I can, I make the court's meaning in them to be:

> The government is immune from liability in storing, diverting, and releasing flood waters un-

> less in doing so it (purposely? negligently?) creates a danger or fails to warn of one and some member of the public is injured by that danger.[1]

In other words, the government is immune from liability until it injures someone and hence *needs* immunity; when it does so, it has none. Unless this is what the court means, then I do not know what it means; and if this *is* what it means, then the government has no more immunity in our circuit from damage to persons by floodwaters than has a private citizen for any other tort. All that is required for its liability is negligence (perhaps) on its part in a flood-control operation, causing injury to a member of the public. As to personal injury, and doubtless as to property damage as well,[2] the court has simply repealed 702c—a stunning exercise in judicial power!

Having disagreed with what I view as a massive judicial recasting of Congressional intent, I feel obliged to offer a different view of it. Both the language of § 702c and the legislative history[3] seem to

---

[1] I am unable to see what "purposes of recreation" adds to or takes from the court's formulation. I doubt that a court, disposed as this one appears to be, would deny recovery, for example, to a motorist with a steaming radiator who was overwhelmed by flood waters while attempting to dip a can of water from the stream below a dam—scarcely a "recreational" purpose.

[2] For I see no way to distinguish between damage to the hypothetical motorist of note *1* and damage to his stalled automobile.

[3] For example, Representative Snell of New York, in a passage quoted by the majority at Slip op. at 4318, at ——, stated:

> I want this bill so drafted that it will contain all the safeguards necessary for the Federal Government. If we go down there and furnish protection to these people—and I assume it is a national responsibility—I do not want to have anything left out of the bill that would protect us now and for all time to come. I for one do not want to open up a situation that will cause thousands of lawsuits for damages against the Federal Government in the next 10, 20, or 50 years.

69 Cong.Rec. 6641 (1928).

It is true that this passage is preceded by one treating of land acquisition. Representative Snell's quoted references to "for all time to come" and to lawsuits over the "next 10, 20, or 50 years" plainly indicate to me, however, that his apprehensions extended beyond the initial land condemnations for levee and by-pass locations.

[4] Nor does the court's reliance on the absence of a general federal torts claims act at the time § 702c was enacted seem to me sound. More than one waiver of immunity in a specific area had been enacted before § 702c—such as the Suits in Admiralty Act, 46 U.S.C. § 741-752—and a general torts claims act had been under active consideration by the Congress since the times of World War I. See *Dalehite v. United States*, 346 U.S. 15, 24, 73 S.Ct. 956, 962, 97 L.Ed. 1427 (1953). Driving down a clear stake in such a dangerous area might well have been seen by the Congress as wise.

me entirely consistent with a purpose in the Congress, poised over a half-century ago on the brink of entry into a massive public works program—one of then unprecedented scope and laden with foreseeable and unforeseeable prospects of liability—to state clearly that the federal treasury was to be placed at risk by it no further than was required by the Constitution.[4] This it did, as in my view the Eighth Circuit correctly observed, in the "broadest and most emphatic language." *National Manufacturing Co. v. United States*, 210 F.2d 263, 270, *cert. denied*, 347 U.S. 967, 74 S.Ct. 778, 98 L.Ed. 1108 (1954). Until today, as

the majority correctly points out, Slip Op. at 4321, at —— *et seq.*, our circuit and every other that has considered § 702c has taken a similar view of the effect of its language. That unanimous construction has stood for three decades without any sign of Congressional dissatisfaction.

Today a different rabbit comes out of the hat, and with a stroke of the pen we impose on the United States precisely the "thousands of lawsuits for damages" [5] that the Congress so plainly refused, in statutory language that is as broad as it is long and, to me, very clear indeed. Because, despite my regard for the majority and its views, this is just the kind of tinkering with statutes that I think judges should not do, I record my respectful dissent.

[5] See note 3 above.

PATRICK E. HIGGINBOTHAM, Circuit Judge, dissenting:

The majority opinion finds ambiguity in the language of 33 U.S.C. § 702c. It then turns to the statute's legislative background in an attempt to learn the immunity clause's true scope. That the effort was exhaustive and so ably done only makes me more sure that there was no clear and universally accepted meaning placed on the indemnity clause by the 1928 Congress.

At its best the legislative history does not disprove the purposes found by my brothers in dissent from the face of the statutory language; but unless that reading is the only permissible reading, as they are persuaded, it does not end the matter. It does not because uncertainty that the 1928 Congress intended to exclude all future liability for government negligence related to flood control projects supports the argument that the Federal Tort Claims Act most directly expresses Congress's intent in this field, and that suits for flood-related negligence should be judged only under the FTCA.[1] Yet, while I see more am-

[1] The result of the court's holding today is that the Federal Tort Claims Act controls. The refusal to consent to liability for discretionary acts of governmental representatives in that act confines its result. Indeed, Congress considered flood control projects in passing that act.

> See H.R.Rep. No. 2245, 77th Cong., 2d Sess., p. 10; S.Rep. No. 1196, 77th Cong., 2d Sess., p. 7; H.R.Rep. No. 1287, 79th Cong., 1st Sess., pp. 5-6; Hearings before House Com. on Judiciary on H.R.5373 and H.R.6463, 77th Cong., 2d Sess., p. 33. The paragraph reads as follows:
>
> Section 402 specifies the claims which would not be covered by the bill.
>
> The first subsection of section 402 exempts from the bill claims based upon the performance or nonperform-

biguity than do my dissenting brothers, it is of no matter because we do not write on a clean slate. Without clear evidence of what Congress meant to do in 1928, I would defer to the longstanding and unanimous construction placed on § 702c by this and other courts—a construction which has given specific and unambiguous content to the clause. The majority has not made the case for turning about at this date, regardless of any ambiguity of § 702c as an original proposition. The task of changing such a settled construction should now be left to Congress. *See Flood v. Kuhn*, 407 U.S. 258, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1972).[2]

---

ance of discretionary functions or duties on the part of a Federal agency or Government employee, whether or not the discretion involved be abused, and claims based upon the act or omission of a Government employee exercising due care in the execution of a statute or regulation, whether or not valid. This is a highly important exception intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid.

Dalehite v. United States, 346 U.S. 15, 29 n. 21, 73 S.Ct. 956, 964 n. 21, 97 L.Ed. 1427 (1942).

[2] "If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court." *Flood*, 407 U.S. at 284, 92 S.Ct. at 2112-13.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 83-2276, 83-4522

CHARLOTTE JAMES, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

KATHY BUTLER, Individually and as Surviving Wife and Heir of EDDY BUTLER, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

SUSAN B. CLARDY, Individually and as Natural Tutrix of the Minors, BRIDGET MARIE CLARDY and KENNETH CLARDY, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Sept. 4, 1984

Appeal from the United States District Court
for the Eastern District of Texas

Appeal from the United States District Court
for the Western District of Louisiana

Before GOLDBERG, RUBIN and REAVLEY, Circuit Judges.

REAVLEY, Circuit Judge:

These cases present the question whether Section 3 of the Flood Control Act of 1928, 33 U.S.C. § 702c (1976), gives the United States absolute immunity for its negligence in the operation of flood control projects. Following the analysis of prior cases, we are obliged to answer in the affirmative, but we take this opportunity to express the opinion that the legislative history analysis previously followed is erroneous and has led to an application of this provision not intended by its framers.

I. STATEMENT OF THE CASE

A. James v. United States

On June 8, 1979, Charlotte James and Kathy Butler were skiing near the dam structure at Millwood Reservoir in Arkansas. The United States Corps of Engineers was discharging water from the dam at a high rate, creating a strong current. The skiers fell near the dam and were pulled by the current through the tainter gates. Eddy Butler dived into the water to assist his wife, Kathy, and was also pulled through the structure. He drowned, and his wife and Charlotte James sustained physical injuries.

No signs warned of the danger of the current. A cable with a string of orange buoys attached to it, which usually delineated the area of danger, had broken and drifted when struck by floating debris.

Only one of five white anchor buoys was in the vicinity of the danger area. Government personnel knew that these warning devices were not in place but did not attempt to repair them because of the dangerous current. They took no other steps to warn the public of the danger.

After a bench trial the district judge found that the plaintiffs were not negligent, that the agents of the United States willfully and maliciously failed to warn of a known danger, and that this failure was a proximate cause of the plaintiffs' injuries. The judge set the damages at $1,000,000 to Kathy Butler for her injuries and the wrongful death of her husband, and $40,000 to Charlotte James for her personal injuries. He concluded, however, that section 702c of the Flood Control Act barred plaintiffs' recovery since the injuries resulted from flood waters related to a flood control project.

B. Clardy v. United States

On May 17, 1980, Kenneth Clardy and his father Joseph Clardy were fishing along Bayou Courtableau, a United States flood control project designed to direct excess floodwaters from Bayou Courtableau Basin through the West Atchafalaya Basin protection levee in Louisiana. The gates of the structure were opened to the maximum capacity, creating a strong current. The Clardy's boat became disabled and drifted into the inlet channel. As it was drawn through the open gates of the spillway, the boat overturned and threw Kenneth Clardy into the approach basin. He drowned while being pulled through the 220 foot long south barrel of the drainage structure.

Only two faded signs at the entrance of the drainage structure warned of the dangerous current. By

the time the signs could be seen, boaters were already in the current. The district judge entered summary judgment for the United States, holding that 33 U.S.C. § 702c immunized it from liability for negligence related to the operation of a flood control project.

II. CURRENT INTERPRETATION OF THE FLOOD CONTROL ACT

The recurrence of floods in the alluvial Mississippi River Valley prompted the United States, in partnership with the states and local governments, to build a network of levees in 1883 along 950 miles of the river banks from Cape Girardeau, Missouri to the Gulf of Mexico. *United States v. Sponenbarger*, 308 U.S. 256, 261, 60 S.Ct. 225, 226-227, 84 L.Ed. 230 (1939). This network of flood control projects, known as the Eads Plan, proved inadequate when a flood of disastrous proportions occurred in 1927. *Id.* Congress responded by passing the Mississippi Flood Control Act of 1928, authorizing $300,000,000 for flood control projects designed to prevent future disasters. *See National Manufacturing Co. v. United States*, 210 F.2d 263, 270 (8th Cir.), *cert. denied*, 347 U.S. 967, 74 S.Ct. 778, 98 L.Ed. 1108 (1954). The Act provided in the second paragraph of section 3 (33 U.S.C. § 702c):

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however*, that if in carrying out the purposes of sections 702a, 702b to 702d, 702e to 702g, 702h to 702j, 702k, 702*l* and 702m of this title it shall be found that upon any stretch of the banks of

> the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of the Army and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

This provision has been applied to flood control projects other than those on the Mississippi River.[1] 33 U.S.C. § 701e (1976); *e.g. Lenoir v. Porters Creek Watershed District*, 586 F.2d 1081, 1086 n.4 (6th Cir. 1978); *Callaway v. United States*, 568 F.2d 684, 686 (10th Cir. 1978); *Clark v. United States*, 218 F.2d 446, 452 (9th Cir. 1954); *National Manufacturing Co.*, 210 F.2d at 274. In interpreting the provision, most courts have cited only the general disclaimer portion stating that no liability shall attach for any flood damage at any place. *See, e.g., Burlison v. United States*, 627 F.2d 119, 121 (8th Cir. 1980), *cert. denied*, 450 U.S. 1030, 101 S.Ct. 1740, 68 L.Ed.

---

[1] At the time of the original flood control bill and in the 1928 Act, the only flood control projects authorized by Congress were on the Mississippi River and the Sacramento River. The prior flood control act and the 1928 Act applied to both projects. H.R. Rep. No. 1100, 70th Cong., 1st Sess. 1, 9 (1928). The title of the Mississippi Flood Control Act is therefore a misnomer.

2d 225 (1981); *Lunsford v. United States*, 570 F.2d 221, 227 (8th Cir. 1977); *Stover v. United States*, 332 F.2d 204, 205 n.1 (9th Cir.), *cert. denied*, 379 U.S. 923, 85 S.Ct. 276, 13 L.Ed.2d 335 (1964); *National Manufacturing Co.*, 210 F.2d at 270. By reviewing only this portion of the section, the courts have construed it to grant immunity in the "broadest and most emphatic language." *National Manufacturing Co.*, 210 F.2d at 270; *see also Morici Corp. v. United States*, 681 F.2d 645, 647 (9th Cir. 1982); *Florida East Coast Railway v. United States*, 519 F.2d 1184, 1192 (5th Cir. 1975); *McClaskey v. United States*, 326 F.2d 807, 808 (9th Cir. 1967).

In *National Manufacturing Co.*, the first case to deal extensively with section 3, the court interpreted the section to provide absolute immunity to the government for any negligence related to floods or flooding. 210 F.2d at 271. There, owners of property along the Kansas River sued the United States for failing to warn of a flood which damaged their property. The Eighth Circuit stated:

> Section 3 plainly bars recovery against the United States. The section does not limit the bar against such recovery to cases where floods or flood waters are the sole cause of damages. It does bar liability of any kind from damages "by" floods or flood waters but it goes further and in addition it bars liability for damages that result (even directly) "from" floods. The use of the word "from" in addition to "by" makes it clear that the bar against federal liability for damages is made to apply wherever floods or flood waters have been substantial and material factors in destroying or damaging property. The language used shows Congressional anticipation that it will

> be claimed after the happening of floods that negligence of government employees was a proximate cause of damages where floods or floodwaters have destroyed or damaged goods. But the section prohibits government liability of "any kind" and at "any place." So that uniformly and throughout the country at any place where there is damage "from" or "by" a flood or flood waters in spite of and notwithstanding federal flood control works no liability of any kind may attach to or rest upon the United States therefor.

The complaint in that case was not directed at government employees engaged in flood control construction, but was confined to flood forecasters. *Id.* at 275. Consequently the holding need not have relied upon section 702c which deals solely with liability for construction of flood control projects. It was, in fact, justified in part on grounds of public policy rather than on a legislative grant of immunity. *Id.* at 274. Nonetheless, *National Manufacturing* absolved the United States of all liability from any damage resulting from floods on the basis of section 702c.

This court has declined to construe section 702c as a wholesale immunization provision. If the flooding is unconnected with flood control projects, the United States may be subject to liability. *Graci v. United States*, 456 F.2d 20, 27 (5th Cir. 1971). Thus, where the government's construction of a navigation project diverted flood water to plaintiff's property, its actions did not come within the section 702c's grant of immunity. *Id.*; *Seaboard Coast Line Railroad Co. v. United States*, 473 F.2d 714 (5th Cir. 1973) (no immunity for flooding of plaintiff's property caused by construction of drainage ditch at aircraft maintenance center). Similarly, the Ninth Circuit has held

702c not to bar liability where the governmental action was wholly unrelated to any act of Congress authorizing expenditures of federal funds for flood control. *See Peterson v. United States*, 367 F.2d 271, 276 (9th Cir. 1966) (no immunity for dynamiting ice jam which resulted in flooding of properties downstream).

If the government's negligence is related to a flood control project, the immunity of the government appears to be absolute. In *Florida East Coast Railway Co. v. United States*, 519 F.2d 1184 (5th Cir. 1975), the United States had built levees and other structures that altered the natural drainage of an area, causing washouts. The United States knew of this problem but took no steps to correct it or to notify the railroad of the danger. The soil around a railroad culvert eroded, causing the derailment of a Florida East Coast train. This court held that the United States was insulated from liability under section 702c even when its own negligence caused or aggravated the losses. *Id.* at 1191.[3]

The Fourth Circuit has held that the government may not enjoy immunity if the negligent action was unrelated to the project's operation for flood control purposes; if the action pertained to recreational purposes rather than flood control purposes, the absolute

[3] It has become the accepted rule that section 702c immunity extends to artificially created floods as well as to government actions which may aggravate the damages in natural floods. *See Aetna Ins. Co. v. United States*, 628 F.2d 1201, 1204 (9th Cir. 1980), *cert. denied*, 450 U.S. 1025, 101 S.Ct. 1732, 68 L.Ed.2d 220 (1981); *Burlison v. United States*, 627 F.2d 119, 121 (8th Cir. 1980), *cert. denied*, 450 U.S. 1030, 101 S.Ct. 1740, 68 L.Ed.2d 225 (1981); *Callaway v. United States*, 568 F.2d 684, 686 (10th Cir. 1978).

bar of section 702c may be avoided. *Hayes v. United States*, 585 F.2d 701, 702-703 (4th Cir. 1978). This reasoning was rejected by the Ninth Circuit in *Morici Corp. v. United States*, 681 F.2d at 648, where it stated that the purpose of the project, rather than the purpose of the employee's conduct, determines the government's immunity under section 702c. This circuit has adopted the Ninth Circuit's view that the *project* must be wholly unrelated to any act of Congress authorizing expenditures of federal funds for flood control. *Florida East Coast Railway Co.*, 519 F.2d at 1191. Even when the United States failed to warn the railway company of the danger of a washout, this negligent action, unrelated to the construction of the flood control project, was held to be within the immunity of section 702c. *Id.*

III. OUR PLAINTIFFS UNDER CURRENT LAW

The cases on appeal are ruled by the inquiry of whether the government's negligent action was related to a federal flood control project. If so, under the controlling precedent, 702c bars liability. Both dam projects in these cases were constructed and operated at least in part for flood control purposes. Even if the project were designed for flood control but operated at the time of the negligence for another purpose such as recreation, the operation that caused the damage would not be "wholly unrelated" to a congressionally authorized flood control project. *Morici Corp.*, 681 F.2d at 648. Plaintiffs have a difficult burden to meet in showing that their injuries had no relation to a flood control project. Indeed, it is insurmountable.

Section 702c provides that "no liability of any kind shall attach to or rest upon the United States for any

damage from or by floods or flood waters . . . ." Appellants argue that immunity may not be invoked under this section because the damages were not caused by floods or flood waters. Clardy, for example, contends that a fact question exists as to whether the waters in Bayou Courtableau were at flood stage, and therefore she deserves the opportunity to prove that the wrongful death was unrelated to flood waters. Liability of the United States for damages due to operation of a flood control project, however, does not depend upon a change in the stage or source of the water in which a plaintiff is immersed. The government enjoys the same immunity whether the water be a giant surge from melting snow and cloudburst or a placid lake on a summer day.[3]

---

[3] Even if our rule limited immunity of the government to cases in which the damage itself is caused by "floods and flood waters," it would be of no help to the Clardy's; waters so described include man-made flow in normal channels. *Id; Aetna Ins. Co. v. United States*, 628 F.2d 1201, 1204 (9th Cir. 1980); *Burlison v. United States*, 627 F.2d 119, 121 (8th Cir. 1980).

The United States filed an affidavit stating that the flood gates of the Courtableau Drainage Structure were open to alleviate flood conditions. Clardy failed to file a controverting affidavit or other competent evidence chailenging this affidavit. Under any view of the law as presently declared, she failed to show that a genuine issue of material fact existed. Fed. R. Civ. P. 56(c), (e); *United States v. An Article of Drug*, 725 F.2d 976, 984-85 (5th Cir. 1984).

We likewise reject James' and Butler's contention that because the waters were in their channels, as opposed to overflowing their banks, they were not flood waters. The waters that swept Eddy Butler to his death and injured Kathy Butler and Charlotte James were release waters from the reservoir. The record shows that the release was required because the lake was at flood stage. Witnesses referred to the waters as

We recognize the harshness as well as the inconsistencies that may result from the controlling precedent of absolute immunity. If, for example, the Corps of Engineers in charge of a flood control project sends out a boat to replace the buoys warning skiers of the water current and in the process, runs over a swimmer, the government may have immunity. If a fisherman on that dam is run over by a negligent government employee whose federal work is unrelated to the flood control project, the fisherman may recover.

IV. BACK TO THE SOURCE

Against this floodtide of authority, and despite the sometimes-heard argument that Congress has signaled its agreement with the statutory construction by leaving the statute unchanged, we believe the effect given section 702c is unwarranted. The United States has sovereign immunity and cannot be sued except when Congress has so provided. *Ickes v. Fox*, 300 U.S. 82, 96, 57 S.Ct. 412, 417, 81 L.Ed. 525 (1937). The Federal Tort Claims Act of August 2, 1946, had not been passed in 1928 or 1936 when section 702c was enacted and amended, and the United States therefore had no liability for damages in tort from floods created or aggravated by the construction of public works for flood control purposes, except with regard to a taking of private property for public uses. *See Jackson v. United States*, 230 U.S. 1, 22, 33 S.Ct. 1011, 1019, 57 L.Ed. 1363 (1913); *Bedford v. United*

"flood waters." Whether waters are retained behind a dam, break through a dam, or are released through a dam, they are flood waters for purposes of section 702c, so long as they relate to a flood control project. *See Florida East Coast Ry. Co.*, 519 F.2d at 1192; *Graci v. United States*, 456 F.2d at 26.

States, 192 U.S. 217, 224, 24 S.Ct. 238, 240, 48 L.Ed. 414 (1904). Why, then, would a 1928 act include a waiver of liability for damages from flood control projects at a time when the government's absolute immunity was unquestioned?[4]

---

[4] Several courts have considered this question. The Eighth Circuit, the first to address this question, stated in *National Mfg. Co.*:

> It was not indicated in the 1928 Act that Congress expected to carry on the federal flood control projects without imposing upon the United States certain obligations to affected owners of property. The constitutional prohibition against the taking of private property for public use without just compensation was kept in view, *U.S. v. Sponenbarger*, 308 U.S. 256, 60 S.Ct. 225, 84 L.Ed. 230, and provision for compensation to be paid to landowners in certain circumstances is contained in the same section 3 which prohibits any federal liability for damage from or by floods or flood waters. The Federal Tort Claims Act of August 2, 1946, had not been passed in 1928 or 1936 and the government then had a certain sovereign immunity from suit for torts but when Section 3 is read in its context it is clear Congress meant by it that damages from or by floods or flood waters should not afford any basis of liability against the United States regardless of whether the sovereign immunity was availed of or not. The declaration of Section 3 negates the existence of a cause of action against the United States in the situation covered by it.

210 F.2d at 270-271 (footnote omitted). The Ninth Circuit concluded in *Peterson*, 367 F.2d at 275:

> When Section 702c was enacted in 1928, and reenacted in 1936, the Federal Tort Claims Act had not been enacted, and the United States, broadly speaking, possessed sovereign immunity from actions sounding in tort. Hence, it cannot be asserted that Congress intended Section 702c to be but a declaration of existing law. Rather, it is clear that Congress intended by the enactment of Section 702c in the Act of May 15, 1928, and in similar subsequent

In 1883, the United States, in cooperation with the state and local governments, constructed a network of flood control projects to alleviate or prevent flooding on the Mississippi River. *United States v. Sponenbarger*, 308 U.S. 256, 261, 60 S.Ct. 225, 227, 84 L.Ed. 230 (1939). The Mississippi River Commission instigated, planned, and executed the project, following a policy of building "levees only" and of closing every outlet on the river, save one. H.R. Rep. No.

> flood control Acts to be an integral part of a plan or policy on the part of the Government to embark on a vast construction program to prevent or minimize the incidences of loss occurring from floods and flood waters by the building of dikes, dams, levees, and related works, and to keep the Government entirely free from liability for damages when loss occurs, notwithstanding the works undertaken by the Government to minimize it.

In *Aetna Ins. Co.*, the court said:

> Plaintiffs also argue that since at the time the immunity statute was passed, some twenty years before the Federal Tort Claims Act, there was no governmental liability for negligence, the immunity statute could not have been intended to provide immunity for negligent conduct in connection with flooding. An equally compelling argument can be made, however, that given the existing broad language of the immunity provision, Congress in passing the Federal Tort Claims Act should have manifested an intent to include flood damage arising out of negligence within the scope of the Federal Tort Claims Act. The legislative history is at best equivocal and the matter has been resolved for our purposes by repeated decisions of the Court which have held that 702c bars suits based on negligence. *McClaskey v. United States, supra; Stover v. United States, supra; Clark v. United States, supra.*

628 F.2d at 1205 (footnote omitted). We find these explanations unpersuasive. We do not see section 702c as a restatement of the sovereign immunity principle so well established at the time 702c was enacted.

1072, 70th Cong., 1st Sess. 1, 5 (1928). The federal government contributed $71,000,000 to the completion of the Commission plan; the state and local governments contributed $170,000,000. *Id.* Total local contributions for flood control projects in this region reached $292,000,000. S. Rep. No. 619, 70th Cong., 1st Sess. 1, 3 (1928).

In 1927, a disastrous flood claimed 200 lives, left 700,000 temporarily homeless, and caused property damage in excess of $200,000,000. *Id.* The "levee only" policy was described as the "monumental blunder of the age" and the Mississippi River Commission was discredited. H.R. Rep. 1072, 70th Cong., 1st Sess. 1, 7 (1928). Congress moved quickly to establish a new flood control plan. It asked the Mississippi River Commission and the Secretary of War each to submit a plan. The plan submitted for the Secretary of War by the Chief of Engineers (the Jadwin Plan), would have required local interests to provide all of the rights of way for the flood control projects, thereby enabling the federal government to keep its contribution to the plan at approximately $296,400,000 over ten years.[5] S. Rep. No. 619, 70th Cong., 1st Sess. 1, 11 (1928). The Commission plan would have required the federal government to bear the costs for the acquisition of land as well as for construction at a total of $560,000,000.[6] Congress

[5] In a message to Congress, President Coolidge stated that it was "axiomatic that states and other local authorities should supply all land and assume all pecuniary responsibility for *damages* that may result from the execution of the project." S.Rep. No. 619, 70th Cong. 1st Sess. at 11 (1928). (emphasis added).

[6] The House estimate of the cost of the Commission plan was $625,000,000, including the value of the required rights of way. H.R.Rep. No. 1100, 70th Cong. 1st Sess. 1, 11 (1928).

compromised[7] the two plans, electing to retain the principle of local contribution, but accepting the $292,000,000 previously expended by local interests on the failed levee system plan as compliance with the contribution requirement. H.R. Rep. No. 1100, 70th Cong., 1st Sess. 1, 3 (1928). Congress authorized the United States to "pay just compensation for all rights of way and *damages*, including expenses to railroads or others in changing their property." *Id.* at 12 (emphasis added). In spite of this, it authorized only $325,000,000 in federal funds for the plan. *Id.* at 13. Section 3 of both the House and Senate versions required that title to the lands be turned over to the states. *Id.* at 5. In a conference committee version, Section 3 was modified, in amendment 14, to state:

> The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: Provided, that in all cases where the execution of the flood control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid.
>
> No liability of any kind shall attach to or rest upon the United States for any damage from or

[7] Congress made a number of compromises. It created a board including the Secretary of War, Chief of Engineers and the Chairman of the Mississippi River Commission to work out the differences in the two plans. It then named the Chief of Engineers as supervisor of the projects, but authorized the Commission to do the work. S.Rep. No. 619, 70th Cong. 1st Sess. 1, 9-10 (1928).

by floods or flood waters at any place: Provided, however, That if in carrying out the purposes of this act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

S. Doc. No. 91, 70th Cong., 1st Sess. 1 (1928) (Conference Report). This was the first mention of the disclaimer of liability for "damages" and, as noted in *Graci v. United States*, 301 F.Supp. 947, 953 n.8 E.D. La. 1969), the legislative history provides little insight into Congress' intent in enacting it.

We think, however, that section 3 must be read in its entirety to determine Congress' true intent. The legislative history reveals that Congress was concerned with allocating the costs of a major public works program between the federal government and the state and local interests in the wake of a financial, administrative, and engineering debacle. Having assumed greater financial responsibility than initially proposed by effectively waiving state and local contribution, Congress sought in conference to adjust its outlays for construction by excepting from its share

the cost of the items considered to be "damages"—acquisition of property for flowage rights, construction of spillways, and destruction of property in conjunction with the construction of the flood control projects.

The juxtaposition of the general disclaimer of liability for damages with the proviso for the acquistion of certain lands for overflow of flood waters where levees could not be constructed suggests their interrelation. We think it clear that Congress intended to disclaim liability for "takings" and not liability for consequential damages. We find support for this reading in the language authorizing the United States to "pay just compensation for all rights of way and *damages*, including expenses to railroads or states in changing their property." H.R. Rep. No. 1100, 70th Cong., 1st Sess. 1, 3 (1928) (emphasis added). Committee testimony further supports this conclusion. Appearing before the Senate Committee on Commerce, H. Generes Dufour, an attorney from New Orleans and a member of the Mayor's Flood Policy Committee in the City of New Orleans, told the Senate Committee:

> Let me remove any misconception as to what is meant by the term "damages." They are not speaking of damages in the sense of those consequential damages that may result from a break of a levee in the future which may overflow some places. It is settled by the jurisprudence of the United States Supreme Court that neither the Federal Government nor the State is responsible for damages resulting from a break in a dam or levee. The damage that is spoken of in the proposal is the damage in the taking. You may not

take the right of way on which a railroad is built in the sense that you take the fee, but when you cause that railroad to be moved or reconstructed in order to create a spillway, let us say, you damage the railroad, and it is a damage in the taking; it a damage resulting from acquisition of necessary property, whether you pay for the property and take the fee or whether you pay damages in the way of flowage right, or whether you destroy a railroad or other property. It is the constitutional protection against the taking of property without just compensation which is involved, and not the consequential damage in the future resulting from the failure of the protective works.

Mississippi River Flood Control Act of 1928: Hearings on S. 3740 Before Senate Committee on Commerce, 70th Cong., 1st Sess., Vol 1, p. 73 (Jan. 24, 1928).

We believe that only this definition of "damages" explains the placement of the disclaimer in section 3 adjacent to two provisions related to the taking of private property for public purposes. It also explains why the Congress would add the provision at a time when it enjoyed absolute immunity from consequential damages. If our interpretation is correct, the Federal Tort Claims Act, 28 U.S.C. § 2674 (1976), should subject the United States to tort claims for flood control projects "in the same manner and to the same extent as a private individual under like circumstances . . . ."[8]

[8] The language of a House Report defining the "boundaries of the sovereign immunity waived" by the Federal Tort Claims Act may be revitalized:

V. CONCLUSION

Having espoused our view of the intent of Congress, we are nonetheless bound by the prior decisions of panels of this circuit. Following *Florida East Coast Railway*, 519 F.2d at 1192, and *Graci*, 456 F.2d at 26, we must affirm the district court's decision in *James v. United States* and *Butler v. United States* that Section 702c bars plaintiffs' recovery for injuries. We must likewise affirm entry of summary judgment against the plaintiff in *Clardy v. United States*.

AFFIRMED.

> The first section of section 402 exempts from the bill claims based upon the performance of discretionary functions or duties on the part of a Federal agency or Government employee, whether or not the discretion involved be abused, and claims based upon the act or omission of a Government employee exercising due care in the execution of a statute or regulation, whether or not valid. This is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity such as a flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid.

See Dalehite v. United States, 346 U.S. 15, 28 n. 21, 73 S.Ct. 956, 964 n. 21, 97 L.Ed. 1427 (1953). *But see Aetna Ins. Co.*, 628 F.2d at 1205 n. 2. This language further suggests that Congress entertained the concept that United States could be liable for its employees' negligence related to a flood control project.

GOLDBERG, Circuit Judge, specially concurring:

My brother Reavley's opinion makes plain the illogic and injustice of the result that the principle of stare decisis forces upon this Court today. Were I young again and not cast in the status of senior judge, I would seek en banc consideration of this case for the purpose of overruling the precedential impediments to plaintiffs' recovery. I would need no further support than my brother Reavley's historiographically brilliant opinion.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Civil Action Number 811791

Section S

SUSAN B. CLARDY, Individually and as Natural Tutrix of Minors, BRIGET MARINE [*sic*] CLARDY and KENNETH WAYNE CLARDY

vs.

UNITED STATES OF AMERICA

[Filed June 30, 1983]

RULING

This matter comes before the Court on motion by the United States to reconsider the Motion for Summary Judgment previously denied by the Court. The government contends it is immune from suit by virtue of the Flood Control Act, 33 U.S.C. § 701 et seq., 33 U.S.C. § 702c. In support of the earlier motion the government submitted the affidavit of Frederick M. Chatry, Chief of Engineering Division, New Orleans District, U.S. Army Corps of Engineers, and now submits additionally the affidavit of Wilson D. Math-

erne, who, on May 17, 1980, was Chief of Flood Control Structures Section, New Orleans District, U.S. Army Corps of Engineers. In opposition thereto plaintiff submits the affidavit and report of Allen L. Cox, Consulting Hydraulic Engineer.

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted when ". . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A careful review of the record reveals that there are no factual issues which preclude the granting of summary judgment herein.

33 U.S.C. § 702c provides that "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." The statute only immunizes the United States from liability for damage caused by a project related to flood control. *Graci v. United States*, 456 F.2d 20 (5th Cir. 1971). The statute has been interpreted to mean that the United States is immune from liability for damages caused by floods or flood waters due to any negligent design, construction, maintenance and operation of United States flood control projects. *Florida East Coast Railway Company v. United States*, 519 F.2d 1184 (5th Cir. 1975); *Graci, supra*. Further, the immunity provision is not limited to water damage attributable to a natural disaster but applies in situations where the flood damage is caused solely by government negligence unaccompanied by unusual natural factors. *Aetna Ins. Co. v. United States*, 628 F.2d 1201 (9th Cir. 1980).

The facts of this case are not in dispute. On May 17, 1980 two men, Joseph W. Clardy and his father,

were fishing along Bayou Courtableau, and were swept through the Courtableau Drainage Structure by the current resulting from its open gates. Joseph W. Clardy did not survive the accident.

The Courtableau Drainage Structure is a United States flood control project designed to direct excess flood flows from Bayou Courtableau Basin through the West Atchafalaya Basin Protection Levee in order to alleviate flood conditions landside of the levee in the area from Bayou Courtableau to Charenton, Louisiana. (Affidavit, Chatry).

The affidavits of Wilson Matherne and report of Allen Cox establish that on May 17, 1980 the water surface elevation was approximately 19.0 feet N.G.V.D. (National Geodetic Vertical Datum) on the landside (upstream) and 18.05 feet on the riverside (downstream) of the structure. The uncontroverted affidavits of Chatry and Matherne further establish that the gates are opened at various times throughout the year to prevent landside water stages from exceeding specified N.G.V.D. limits, and that on May 17, 1980, the gates were opened to fifteen (15′) feet, the maximum that they can be opened, because of the landside water levels existing on that date. In his affidavit Matherne stated that "Based on my experiences as Chief, Flood Control Structures Section, I know that the landside water levels existing on May 17, 1980, would have caused flood conditions and flooding landside of the levee if the gates of the Courtableau Drainage Structure had not been opened as they were on that date. There are many farms landside of the levee in the vicinity of the Courtableau Drainage Structure which would have been inundated by these waters had the drainage structure not been operated and its gates open as they were on May 17, 1980."

Plaintiff's main contention is that the statute immunizes the United States from liability caused by "floods or flood waters" and that there were neither floods nor flood waters present herein. It is admitted by defendant that the gates were opened to *prevent* flooding and inundation landside of the drainage structure. (Affidavit, Chatry). The plaintiffs would have this Court conclude that the United States is immune from the negligent design of a flood control project, causing inundation by collapse, *Aetna, supra,* for its negligent design and operation of a flood control project causing washouts, *Florida East Coast Railway, supra,* or for its negligent construction and maintenance of flood works during a hurricane, *Graci, supra,* but not for the negligent operation * of a flood control project to alleviate excess waters collecting landside of the levee. (Affidavit, Chatry). To this Court, excess waters which create potential for flood are "flood waters" within the meaning of the statute.

The Courts have broadly construed the statute to effectuate Congressional intent. See *Graci, supra,* and cases therein cited. The Court in *Graci* recognized the purpose of the statute:

> "Congress undoubtedly realized that the cost of extensive flood control projects would be great and determined that those costs should not have added to them the floodwater damages that might occur in spite of federal flood control efforts . . . As Judge Heebe expressed it, the 'immunity from liability for flood water damage arising in connection with flood control works was the condi-

* The United States does not concede that it negligently failed to warn decedent.

> tion upon which the government decided to enter into the area of nationwide flood control programs." 301 F.Supp. at 952. See also *Clark v. United States,* 218 F.2d 446 (9th Cir. 1954)' *Graci,* at 26.

The very purpose of the Courtableau Drainage Structure, which is a federal flood control project, is to alleviate flood conditions landside of the levee. The Court can only conclude that the immunity from liability for damages caused by "floods or flood waters" attaches in a situation where waters are released to prevent backup and consequent flooding.

In conclusion, the facts are undisputed that on May 17, 1980 the existing water levels would have caused flood conditions and flooding landside of the levee in question had not the gates been open. Flood waters have been defined as used in Section 702c to encompass the extraordinary rising of waters as existed in the instant matter. See *Florida East Coast Railway, supra.* Since it is clear that Congress granted immunity to the United States in the broadest and most emphatic language this Court would conclude that Congress also intended to give a broad common sense definition to flood waters, which limits have in some instances been held to include waters which rise above the line of highest ordinary flow.

For the reasons hereinabove set forth, the Motion for Summary Judgment is hereby GRANTED.

Opelousas, Louisiana, June 30, 1983.

/s/ John M. Shaw
JOHN M. SHAW
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Civil Action No. 811791

Section "S"

SUSAN B. CLARDY, Individually and as Natural Tutrix of the Minors, BRIDGET MARIE CLARDY and KENNETH CLARDY

vs.

UNITED STATES OF AMERICA

[Filed July 15, 1983]

JUDGMENT

This matter came on for consideration after the filing of a motion for summary judgment on behalf of defendant, UNITED STATES OF AMERICA. The Court hearing the law and the evidence and same being in favor of defendant, UNITED STATES OF AMERICA, and for written reasons filed on June 30, 1983,

IT IS ORDERED AND ADJUDGED that the motion for summary judgment filed on behalf of defendant, UNITED STATES OF AMERICA, is hereby granted, dismissing the complaint of plaintiffs,

SUSAN B. CLARDY, INDIVIDUALLY AND AS NATURAL TUTRIX OF THE MINORS, BRIDGET MARIE CLARDY AND KENNETH WAYNE CLARDY, with prejudice, at plaintiffs' cost.

OPELOUSAS, LOUISIANA, this 15th day of July, 1983.

/s/ John M. Shaw
JOHN M. SHAW, Judge
United States District Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

Civil Action No. M-81-99-CA

KATHY BUTLER, Indiv. and as Surviving Wife and Heir of EDDY BUTLER, and CHARLOTTE JAMES

v.

UNITED STATES OF AMERICA

[Filed April 4, 1983]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Federal Rule of Civil Procedure 52, the Court hereby enters the following Findings of Fact and Conclusions of Law.

The facts of this case constitute a classic classroom example of a death and injuries resulting from conscious governmental indifference to the safety of the public. This case goes beyond gross negligence. The death and injuries resulted from a course of action taken by the management-level employees of the United States Corps of Engineers who had full knowledge of the consequences of their acts. The Court is also persuaded that it was not Congress's intent to grant immunity under this fact situation when it enacted 33 U.S.C. § 702(c) was enacted [sic]. However, the plain language of the statute requires the Court to apply it to this fact situation and to, therefore, grant immunity to the United States and deny relief to the Plaintiffs. The Court has included Findings of Fact and Conclusions of Law that address all matters in controversy even though the immunity question disposes of this case. The Court makes these findings so the case will be in a posture for the appellate court to reform the judgment in the event the Court's interpretation or application of 33 U.S.C. § 702(c) is found to be in error.

I.

FINDINGS OF FACT

1. Plaintiffs are citizens and residents of the State of Texas.

2. These claims arise under 28 U.S.C. § 1346(b), otherwise known as the Federal Tort Claims Act.

3. The accident made the basis of these claims occurred on June 8, 1979, on Millwood Reservoir, near Ashdown, Arkansas, within the State of Arkansas.

4. Millwood Reservoir is a Congressionally authorized federal multi-purpose project, owned and operated by the United States Department of Army Corps of Engineers.

5. One of the purposes of the Millwood Reservoir Project is flood control.

6. On the day of the accident, Millwood Reservoir Project was in flood control status, and water was being discharged through the tainter gates of the dam structure at the rate of approximately 24,000 cubic feet per second. The water being discharged had been previously entrapped as part of the flood control func-

tion of the facility. The water level of the lake was such that it was designated as "flood stage." Therefore, the water being discharged was *flood control water* under the provisions of 33 U.S.C. § 702(c).

7. Plaintiffs Kathy Butler and Charlotte James were waterskiing, or attempting to do so, when they and the other members of their group, who occupied a boat, began drifting toward the dam structure on Millwood Reservoir because of the current created by the discharge of water.

8. Eddy Butler, deceased, dived from the boat into the water in an attempt to assist his wife, Kathy Butler.

9. Ultimately, all three persons, Eddy Butler, deceased, Kathy Butler, and Charlotte James, were swept through the tainter gates of the dam structure and into the spilling basin below. Eddy Butler drowned as a result of this experience. The boat, which remained occupied by Christopher James and his daughter, Sonja James, became lodged in one of the tainter gates, and the occupants were rescued from above without injury. The boat was ultimately permitted to go through the tainter gates, and was destroyed in this occurrence.

10. Normally in place in front of the dam structure were five anchor buoys, white in color, with orange or red symbols painted thereon, some of which indicated danger, and others of which indicated restricted area.

11. The white anchor buoys were not in their proper place on the day of the accident. Only one white buoy was even in the vicinity of the area in which it should have been located. The location of the white anchor buoys at the time of the accident provided no warning to a reasonably prudent recreational user of the lake.

12. Normally in place, but not in place on the day of the accident, was a string of orange capsule-type buoys.

13. The cable to which these orange capsule-type buoys were attached had been broken for some time preceding the accident because of the current generated by the discharge of water and/or moving driftwood.

14. The Defendant had actual knowledge of the fact that the white buoys and the orange capsule-type buoys were not in place on the day of the accident.

15. The Defendant had not made repairs to the orange capsule-type buoys prior to the accident, or replaced said buoys prior to the accident.

16. The Defendant created a dangerous condition to those situated as the Plaintiffs through the discharge of water at a high rate through the tainter gates at Millwood Reservoir.

17. The Defendant knew that the dangerous condition created would result in injury to those situated as the Plaintiffs if an adequate warning was not given as to the dangerous condition created.

18. The Defendant failed to give any warning of the dangerous condition that it created.

19. The Defendant knew that its failure to adequately warn of the dangerous condition could cause injury to those situated as the Plaintiffs.

20. By such conduct the Defendant acted in knowing disregard of the consequences to those situated as the Plaintiffs.

21. The Defendant, in periods of low discharge maintained a greater warning system when the risk and danger was less to those situated as Plaintiffs, and as the risk and danger increased, the amount of warning decreased.

22. Although having full knowledge of the lack of an adequate warning, the Defendant continued to discharge without taking any steps to warn those situated as the Plaintiffs.

23. Although having full knowledge of the increased danger and increased risk to those situated such as the Plaintiffs, the Defendant made no attempt to give an adequate warning when the portion of their warning buoys were not in place.

24. The Defendant had facilities available to have given such adequate warnings of the increased risk, but consciously elected and made no attempt to do so.

25. The Piaintiffs were not negligent on the occasion in question and their injuries were not proximately caused by their conduct. Specifically, the Court notes that Eddy Butler, deceased, did not have a life jacket on on the occasion. The Court finds that this was not negligence since he was a passenger in the boat and entered the water only in the emergency situation created by the undertow pulling his wife and Mrs. James toward the discharge gates. He acted reasonably in light of the emergency.

26. The sum of One Million Dollars ($1,000,000.00) would fairly and reasonably compensate the Plaintiff Kathy Butler for her legal damages.

27. The sum of Forty Thousand Dollars ($40,000.00) would fairly and reasonably compensate the Plaintiff Charlotte James for her legal damages.

28. Any Conclusion of Law which may be deemed a Finding of Fact is hereby adopted as part of these Findings.

II.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and of the subject matter by virtue of 28 U.S.C. § 1346(b).

2. Arkansas substantive law applies to the determination of liability in these claims by virtue of the fact that the accident in question occurred within the State of Arkansas, and Arkansas law is to be applied under the terms of the Federal Tort Claims Act.

3. Arkansas has adopted the Arkansas Recreational Use Statute (Sections 50-1101 to 50-1107) and such Act was in full force and effect at the time of the occurrence made the basis of these claims. The purpose of such Act is to encourage owners of land to make land and water areas available to the public for recreational purposes. Recreational purposes include, but are not limited to, the following: hunting, fishing, swimming, boating, camping, picknicking, hiking, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites. Arkansas Statutes Annotated, Sections 50-1101, 50-1102(c).

4. Under the Statute, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering without charge. Nor does an owner of such property who directly or indirectly invites or permits without charge any person to use such property for recreational purposes thereby extend any assurance that the premises are safe, nor assume liability for any injury to persons or property. Arkansas Statutes Annotated, Section 50-1104(a)(b)(c).

5. The owner of land used by others for recreational purposes, without charge, owes only a duty not to injure such persons by willful or malicious conduct or by willful or malicious failure to warn of danger. Arkansas Statutes Annotated, Section 50-1106(a).

6. The Defendant's conduct constitutes willful and malicious conduct under Arkansas law in that Defendant's failure to warn would naturally or probably result in injuries, in that Defendant knew or reasonably knew that their failure to warn of a known danger created by Defendant would result in injury and in that Defendant continued such course of conduct in reckless disregard of the consequences and particularly with reckless disregard of the dangers and injuries that would likely be suffered by those situated as the Plaintiffs.

7. By such conduct Defendant acted in knowing disregard of the consequences to the skiiing public such as the Plaintiffs.

8. The Defendant, however, is afforded immunity from these claims by virtue of 33 U.S.C. § 702(c); wherein immunity is granted by virtue of the relationship between damages asserted and the Reservoir's operation of a federal flood control project. Specifically, no liability arises where damage is caused by floods or flood control waters.

9. The Defendant is afforded immunity because Plaintiffs' damages, injuries and death resulted from their being swept through the tainter gates of the dam structure by the force of the water current generated by the intentional opening of the tainter gates for flood control purposes. Hence, the damage was caused by flood control waters.

10. Because of the immunity afforded Defendant, Judgment is entered for Defendant and against Plaintiffs.

11. Any relief prayed for by the parties not specifically granted herein, is hereby DENIED.

12. Any Findings of Fact which may be deemed a Conclusion of Law is hereby adopted as part of these Conclusions.

SIGNED and ENTERED this 31st day of March, 1983.

/s/ Robert M. Parker
ROBERT M. PARKER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

Civil Action No. M-81-99-CA

KATHY BUTLER, Indiv. and as Surviving Wife and Heir of EDDY BUTLER, and CHARLOTTE JAMES

v.

UNITED STATES OF AMERICA

[Filed April 4, 1983]

JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law filed herein; the Court hereby enters judgment in favor of Defendant and against the Plaintiffs with cost being borne by the Plaintiffs. It is so ORDERED.

SIGNED and ENTERED this 31st day of March, 1983.

/s/ Robert M. Parker
ROBERT M. PARKER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

Civil Action No. M-81-99-CA

KATHY BUTLER, Individually and as Surviving Wife and Heir of Eddy Butler

vs.

UNITED STATES OF AMERICA

[Filed April 26, 1983]

ORDER

The Court hereby supplements the Findings of Fact and Conclusions of Law entered on its previous Order with the following additional Findings of Fact and Conclusions of Law:

ADDITIONAL FINDINGS OF FACT

1. Flood control is not the only purpose of the Millwood Reservoir Project, and that some of the additional purposes are to provide a recreational facility for boating, water skiing and fishing; to provide a reservoir for water supply to various municipalities and communities in the vicinity of the Millwood Reservoir Project.

2. The Defendant recognized its duty to provide for the safety of recreational users of the Millwood Project.

3. The Defendant recognized that it had a continuing duty to provide for the safety of the recreational users of the project during flood control.

4. The Defendant had more manpower available for providing for the safety to the recreational users during flood control, because the maintenance that could be done to the dam flood gates and other appurtenances was limited during the period of flood control.

5. The Defendants willful and malicious failure to warn of a known danger was a proximate cause of the Plaintiffs injuries, and Eddy Butler's death, and all Plaintiffs damages.

6. Millwood Reservoir is not navigable in fact.

7. Any additional conclusion of law which may be deemed a finding of fact, is hereby adopted as part of these additional findings of fact.

ADDITIONAL CONCLUSIONS OF LAW

1. The Defendant through its willful and malicious conduct wholly failed to discharge the duties it owed to Plaintiffs as the recreational users during periods of flood control.

2. Admiralty jurisdiction does not apply by virtue of the fact that Millwood Reservoir is not navigable in fact.

3. Any additional findings of fact which may be deemed a conclusion of law is hereby adopted as a part of these additional conclusions of law.

SIGNED and ENTERED this 25th day of April, 1983.

/s/ Robert M. Parker
JUDGE ROBERT M. PARKER
United States District Court

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-4522

D. C. Docket No. CA-81-1791-S

SUSAN B. CLARDY, Individually and as Natural Tutrix of the Minors, BRIDGET MARIE CLARDY and KENNETH CLARDY, PLAINTIFF-APPELLANT

versus

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Western District of Louisiana

---

Before CLARK, Chief Judge, GOLDBERG, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS and HILL, Circuit Judges.*

GEE, Circuit Judge, with whom GARWOOD, JOLLY, DAVIS and HILL, Circuit Judges join, dissenting.

HIGGINBOTHAM, Circuit Judge, dissenting.

* Judge Goldberg, now a senior judge of this circuit, is participating as a member of the panel that initially considered the appeal now subject to en banc review.

JUDGMENT

This cause came on to be heard on rehearing en banc with oral argument.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

May 16, 1985

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-2276

D. C. Docket Nos. M-81-99-CA cons. w/M-82-28-CA

CHARLOTTE JAMES, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLEE

KATHY BUTLER, Individually and as
Surviving Wife and Heir of
EDDY BUTLER, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLEE

Appeal from the United States District Court for the Eastern District of Texas

---

Before CLARK, Chief Judge, GOLDBERG, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS and HILL, Circuit Judges.*

GEE, Circuit Judge, with whom GARWOOD, JOLLY, DAVIS and HILL, Circuit Judges join, dissenting.

HIGGINBOTHAM, Circuit Judge, dissenting.

* Judge Goldberg, now a senior judge of this circuit, is participating as a member of the panel that initially considered the appeal now subject to en banc review.

JUDGMENT

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc with oral argument.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiff-appellants the costs on appeal, to be taxed by the Clerk of this Court.

May 16, 1985

★ U. S. GOVERNMENT PRINTING OFFICE: 1985 481891 10877

OPPOSITION

BRIEF

FILED
OCT 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-434

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, *Petitioner*,

vs.

CHARLOTTE JAMES.

UNITED STATES OF AMERICA, *Petitioner*,

vs.

KATHY BUTLER, INDIVIDUALLY AND AS SURVIVING WIFE AND HEIR OF EDDY BUTLER.

UNITED STATES OF AMERICA, *Petitioner*,

vs.

SUSAN B. CLARDY, INDIVIDUALLY AND AS NATURAL TUTRIX OF THE MINORS, BRIDGET MARIE CLARDY AND KENNETH CLARDY.

BEST AVAILABLE COPY

BRIEF IN RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SHARP, WARD, PRICE, HIGHTOWER & SEARCY
T. JOHN WARD
(Attorney of Record)
RICHARD F. HIGHTOWER
Post Office Drawer 3106
Longview, Texas 75606
214/757-2880
Attorneys for Respondents, Butler and James

E. L. MENDENHALL, INC., 928 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED

Whether the governmental immunity provided by 33 U.S.C. §702(c) extends to the fault of government employees who fail to warn the invited public of the existence of hazards to the accepted use of governmentally impounded waters.[1]

---

1. Petitioner presents to this Court the question of whether 33 U.S.C. §702(c) bars Respondents' recovery for injuries caused by the release of floodwaters. However, the majority opinion does not impose negligence on the government in relation to its "release" of the waters. In fact the majority holding expressly retains such immunity. What the majority holding refuses to immunize is the government's negligent commissions or omissions that diverge from acts strictly for the purpose of controlling floods or floodwaters, and the presence of or movement of water for flood control purposes merely furnishes a condition of the accident. Here the negligent commission is not the "release" of floodwater, but rather the government employees' failure to warn the invited public of the existence of hazards to their accepted use of government impounded water or nearby land.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

No. 85-434

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, *Petitioner*,

vs.

CHARLOTTE JAMES.

UNITED STATES OF AMERICA, *Petitioner*,

vs.

KATHY BUTLER, INDIVIDUALLY AND AS SURVIVING WIFE AND HEIR OF EDDY BUTLER.

UNITED STATES OF AMERICA, *Petitioner*,

vs.

SUSAN B. CLARDY, INDIVIDUALLY AND AS NATURAL TUTRIX OF THE MINORS, BRIDGET MARIE CLARDY AND KENNETH CLARDY.

BRIEF IN RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REASONS FOR DENYING PETITION

The Appellate Court in its holding has provided an accurate interpretation to the immunity clause of 33 U.S.C. §702(c)[2] (hereinafter referred to as 702(c)). Because of

2. "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood-waters at any place."

the latent ambiguities in the wording of the immunity clause itself especially when viewed with the complete text of the statute as a whole, the Court properly examined the legislative history behind 702(c) and the Federal Flood Control Act[3] as a whole. Upon examination of the legislative history behind the enactment of 702(c), the majority clearly shows that the immunity clause contained in 702(c) was intended by Congress to immunize property damage necessarily related to the cost of the project without concern or consideration for personal injury damages. In examining all of the appellate holdings wherein 702(c) was considered, 21 of the 23 cases were brought to recover damage to property (land and crops).[4] The two other decisions did not immunize the government from personal injury liability.[5]

The majority opinion, in essence, rectifies the judicial misconstruction given to 702(c) in the cornerstone case of *National Manufacturing Co. v. United States*, 210 F.2d 263 (8th Cir.), cert. denied, 347 U.S. 967, 74 S.Ct. 778, 98 L.Ed. 1108 (1954), which laid the foundation for continued judicial misapplication. The appellate decision here for the first time properly applies 702(c) to a personal injury action as it was intended.

The appellate court interprets 702(c) to hold that immunity does not extend to the fault of government employees who fail to warn the public of the existence of hazards to the accepted use of governmentally impounded waters, conduct which the District Court finds as "willful

3. Flood Control Act of 1928, 33 U.S.C. 701 et seq.

4. Majority opinion footnote No. 16 appearing on Page 19a of Petitioner's Application.

5. Majority opinion footnote No. 16 appearing on Page 19a of Petitioner's Application.

and malicious"[6] and which even Justice Gee in his dissent terms as "perhaps callous".[7] What the Appellate Court has provided is an application of 702(c) consistent with the wording of the statute, its historical context, and its legislative history. Most importantly, the Court has provided an interpretation consistent with the purpose of the *Federal Tort Claims Act*,[8] and an interpretation enhancing public policy considerations. For these reasons, review by this Court is unnecessary.

A. PLAIN MEANING OF STATUTE

Petitioner asserts to this Court that the wording of the immunity clause itself of 702(c) precludes further examination into the meaning of the statute. Petitioner requests this Court to ignore the legislative history behind this enactment because to do so clearly indicates that 702(c) immunity was not intended by Congress to extend to the facts of this case.

Respondent is certainly aware that in a case involving the construction of a statute the starting point should necessarily be the construction of a statute itself. However this Court should not preclude the examination of available persuasive evidence such as the legislative history herein, especially in light of the harsh and illogical results which occur from the interpretation which Petitioner urges this Court to accept.[9]

6. Conclusions of Law of District Court, No. 6 appearing on Page 72a of Petitioner's Application.

7. Dissenting opinion, Page 31a.

8. 28 U.S.C. 1346(b), 2671 et seq.

9. *Blum v. Stenson*, U.S. , 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891, 900 (1984). *Watt v. Alaska*, 451 U.S. 259, 266, 101 S.Ct. 1673, 1678, 68 L.Ed.2d 80, 88 (1981) quoting *Boston*

(Continued on following page)

To quote the majority opinion, the language of the immunity clause is not "clear cut and unambiguous however clear the words may appear on a superficial examination. We do not think for instance that it is evident what constitutes 'a flood' or 'floodwaters', nor is the word 'damage' quite unequivocal, nor is it clear why 'at any place' was tacked onto the sentence inasmuch as the immunity language is comprehensive without it."[10]

With these "latent" ambiguities on the face of the clause itself certainly this Court is obligated to examine the remainder of the statute, as well as its legislative history to determine Congress' true interpretation, especially in light of the harsh and illogical consequences of the literal interpretation which Petitioner urges this Court to accept.[11]

B. LEGISLATIVE HISTORY

The purpose behind the wording of the 702(c) immunity clause was to identify the allocation of cost between the state and local government and federal government to enter into a major public works program in regard to flood control. In addition to the costs or damages of the construction itself, other costs would necessarily include the acquisition of property rights for levees and

---

Footnote continued—

Sand Co. v. United States, 278 U.S. 41, 48, 49 S.Ct. 52, 54, 73 L.Ed. 170 (1928) wherein the Supreme Court refined the plain-meaning rule which "is 'rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists.' The circumstances of legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect." See also footnote No. 3, majority opinion appearing on Page 6a of Petitioner's Application.

10. Majority opinion Page 6a-7a of Petitioner's Application.

11. For example of the illogical results of Petitioner's interpretation see majority opinion Page 9a of Petitioner's Application.

diversion channels where water would flow at normal as well as at flood stages, and the relocation of roads and other facilities. The federal government certainly did not want to undertake the entire cost of such a project and from this concern Congress adopted the immunity language of 702(c). Because of the clearness and completeness of the majority opinion's summary of the legislative history behind the enactment of 702(c), Respondent would certainly defer to those portions of the majority opinion's summary of the legislative debate and purposes behind 702(c) which illuminate the reasoning behind the broad wording of the immunity clause contained therein.[12]

It becomes evident when examining this history as cited in the majority opinion, that the immunity clause arose as a result of Congress' intent to clearly set forth those costs in regard to the project at hand that the federal government would be responsible for, and none else. Petitioner tries to use this clause to prevent recovery in the case at hand by arguing that Congress intended by this language to exclude personal injury damages. However, what this Court must remember is that at the time of the passage of the Federal Flood Control Act (1928) the government had no liability for personal injuries whatsoever because of the doctrine of sovereign immunity. The question must be asked as to why the government would insulate itself from liability for personal injuries at a time that it already enjoyed complete immunity for personal injuries. The only answer is that the government was not concerned with these types of damages, but only those costs related to property damages. Congress decided that with the narrow exceptions stated in the act

---

12. For a complete discussion of pertinent legislative history behind the passage of the Federal Flood Control Act (1928) see majority opinion Page 11a-20a of Petitioner's Application.

(construction costs, rights of way, and constitutional takings) the federal government was not to pay the cost for floodwater inundation or damage. This is clearly supported by the majority opinion summary of the legislative history and debate.

Never in the congressional debates was it discussed that Congress was immunizing personal injury damages, in fact only property damages were ever discussed. As stated in the majority opinion:

> "It is even less likely that Congress was immunizing the government from liability for personal injuries apart from pure property costs, only the latter having been discussed in debates."[13]

Also as set forth by the majority:

> "The statutory language itself suggests this consturction. It is elementary that the statutory provision is properly read as a whole. The immunity provision is only the first part of a very long sentence, which continues in part: 'provided however that if . . . lands in [a] stretch of river are subjected to overflow and damage which are not overflowed or damaged by reason of the construction of levees, the [government] shall acquire either absolute ownership of the land so subjected to overflow and damage or floodage rights over such lands.'
>
> It becomes evident from looking at the statutory construction as a whole that this is a statute about damage to lands, not about people who are hurt or killed."[14]

13. Majority opinion footnote 16 appearing at Page 19a of Petitioner's Application.

14. Id.

With this historical background and legislative history it becomes evident that the only reason for the broad wording of the immunity clause of 702(c) was to allocate the cost of the project at hand. As stated by the majority opinion, this explanation of the statutory language is demonstrable on four grounds:

1. In congressional debate the words "liability" and "damages" (which Petitioners argue refer to personal injury damages) were repeatedly used in reference to these costs. Never in the congressional debate were the terms "liability" and "damages" ever discussed in regard to personal injury.

2. The proviso of 702(c), the language immediately following the disclaimer, apportions costs in the event of inundated and overflowed lands due to levees having been impractical.

3. Immunity was a legislative answer on the controversial issue of whether the federal government or other entities would absorb the cost of the project.

4. Legislative history is replete with reference to damaged land, strongly suggesting the conclusion that the phrase "at any place", as used in the immunity clause, was intended to be read as if it were to any place i.e. property damage.[15]

In examining the historical context of 702(c) and the legislative history contained therein, it is evident that Congress was not intending to preclude any and all governmental liability for the negligent or wrongful acts of government employees such as the Petitioner urges.

15. Majority opinion Page 8a of Petitioner's Application.

C. JUDICIAL MISCONSTRUCTION

Petitioner argues to the Court that it should grant the Petition because the decision of the Fifth Circuit has radically departed from settled interpretation of 702(c). However, in actuality the Fifth Circuit for the first time has directly applied 702(c) to a personal injury cause of action.

In *National Manufacturing*,[16] an appellate court for the first time dealt extensively with 702(c). Here the owners of property sued the United States for failing to warn of a flood which damaged their property. The complaint therein was not directed at government employees engaged in flood control, but was confined to flood forecasters.

Respondent concedes to this Court that the holding of the Fifth Circuit in the case at hand does conflict with the broad language used in the *National Manufacturing* decision, which became the cornerstone case for subsequent decisions indicating such broad immunity through 702(c). However, it should be noted that the *National Manufacturing* decision (1) dealt with property damage not personal injury damage; (2) incorrectly assumed that the immunity language of the 1928 Act would be carried forward into the 1936 National Flood Control Act which created the Millwood Dam wherein Plaintiffs were injured;[17] and (3) the *National Manufacturing* opinion while mentioning the legislative history certainly does not set forth such a full and complete rendition and analysis of the 1928 Flood Control Act as does the majority opinion herein. It is interesting

16. *Supra*, Page 2 text.

17. See majority opinion footnote No. 23 appearing on Page 24a of Petitioner's Application wherein it is pointed out that immunity clause contained in the 1928 act was not carried forth in the 1936 Act, 33 U.S.C. §701a-701u, specifically from whence Millwood Dam and Reservoir was authorized.

that the Petitioner herein argues that the plain meaning of the immunity clause prohibits examination of the legislative history of 702(c) when the *National Manufacturing* court (on which Petitioner bases its case) felt it necessary to attempt to do so.

However, unquestionably, certain Circuits have followed the broad and encompassing language of *National Manufacturing*. As stated by the Tenth Circuit which followed the literal language of *National Manufacturing*:

> "We can see no set of facts appellants can prove in support of their claims for recovery which would not be barred by 33 U.S.C. §702(c)."[18]

However, certain courts have retreated from this broad encompassing language of *National Manufacturing*. The Fourth Circuit Court has restricted the immunity more closely to the limited purpose of the statute; to management of the water only if the purpose of the flood control is thereby served.[19] Other circuits have declined to construe 702(c) as a wholesale immunity provision and have held that if the flooding is unconnected with flood control projects the United States may be subject to liability.[20]

It also should be noted that 21 of the 23 cases involving 702(c) interpretations by appellate courts have dealt with property damage as opposed to personal injury. The two cases dealing with personal injury decided the case on grounds other than 702(c).[21] What the Fifth Circuit did for the first time is apply 702(c) directly to a personal in-

18. *Calloway v. United States*, 568 F.2d 684, 687 (10th Cir. 1978).

19. *Hayes v. United States*, 585 F.2d 701 (4th Cir. 1978).

20. See *Graci v. United States*, 456 F.2d 20, 27 (5th Cir. 1971), and *Peterson v. United States* 367 F.2d 271, 276 (9th Cir. 1966).

21. Footnote 3 *supra*.

jury cause of action. Although the Fifth Circuit opinion has deviated from the broad brush interpretation given in *National Manufacturing*, the Court in essence has only corrected a judicial misconstruction which has been impounded through the years—certainly because of the harsh and illogical result, one that should have been corrected.

D. POLICY SERVED

The overriding reason for this Court to deny the Petition is because public policy has been enhanced by the Fifth Circuit's interpretation given to 702(c). The majority has given 702(c) an interpretation which immunizes the government for reasons that it was intended (negligence in the control of flood gates or managing lands to contain, prevent or manage floods or floodwaters). The majority has left intact the governmental immunity for the storing, diversion and release of waters. However, the majority's interpretation has created liability on the government when the government invites recreational users, such as the Plaintiffs, to come upon those waters and its nearby shores, and creates or fails to warn of the danger—actions totally unnecessary and unrelated to flood control purposes.

To apply a literal interpretation to 702(c) as Petitioner urges, would create a scenario whereby there is no set of facts by which the government could be held responsible for its conduct (negligent or intentional) wherein flood waters serve as a condition to the accident. To follow the Petitioner's interpretation would provide the government immunity regardless of its conduct.

Herein Plaintiffs were injured when the government had actual knowledge of the dangerous condition it created, actual knowledge that the warning buoys were missing and that boaters and skiers might be injured, and nonetheless failed to take corrective measures.[22] Judge Parker, the trial judge, concluded that this action constituted a "classic example of death and injuries resulting from conscious governmental indifference to the safety of the public beyond gross negligence."[23] Certainly this type of conduct was not intended by the legislature to be immunized when at the time of the passage of the Federal Flood Control Act the government enjoyed full scale immunity from personal injury damages. Certainly this type of conduct should not be immunized today.

Also important is that there exists a great likelihood of repeated injuries such as to these Plaintiffs because of acts or omissions by the government.[24] Certainly it is the government and only the government which is in a position to give such warnings with a minimal effort on its part. The majority opinion properly applies policy to its interpretation in holding the government liable for its acts and omissions diverging strictly from acts strictly for flood control purposes.

SUMMARY

By examining the legislative history and purpose behind the 702(c) immunity clause it is evident that Congress did not intend 702(c) to apply to the facts involved in this case. It is obvious that the legislature was only intending to apportion costs by its passage of the blanket

---

22. Findings of Fact Page 67a-70a of Petitioner's Application.

23. Preface to Findings of Fact Page 66a of Petitioner's Application.

24. Even Petitioner in Petitioner's Application at Page 20 admits the repeated injury to persons is likely at flood control projects.

immunity clause of 702(c). At no time did Congress ever intend 702(c) immunity to extend to the facts involved in the case at hand.

The majority opinion in its analysis has provided an interpretation of 702(c) consistent with the true history and purpose behind the passage of the act yet consistent with public policy today. The government certainly should not enjoy full immunity despite its conduct wherein the movement of water for flood control merely furnishes a condition to an accident that it has created.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

T. JOHN WARD
RICHARD F. HIGHTOWER
SHARP, WARD, PRICE, HIGHTOWER & SEARCY
Post Office Drawer 3106
Longview, Texas 75606
214/757-2880

October 1985

OPPOSITION

BRIEF

(3)

No. 85-434

Supreme Court, U.S.
FILED
OCT 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLOTTE JAMES

UNITED STATES OF AMERICA, PETITIONER

v.

KATHY BUTLER, INDIVIDUALLY AND AS SURVIVING WIFE AND HEIR OF EDDY BUTLER

UNITED STATES OF AMERICA, PETITIONER

v.

SUSAN B. CLARDY, INDIVIDUALLY AND AS NATURAL TUTRIX OF THE MINORS, BRIDGET MARIE CLARDY AND KENNETH CLARDY

OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SAM J. D'AMICO
J. MICHAEL McDONALD
D'AMICO, CURET & DAMPF
SUITE 610
263 RIVERSIDE MALL
BATON ROUGE, LOUISIANA 70801
TELEPHONE: (504) 387-2273

Counsel for Respondent, Susan B. Clardy, individually and as natural tutrix of the minors, Bridget Marie Clardy and Kenneth Clardy

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REASON FOR DENYING THE WRIT

THE IMMUNITY FROM LIABILITY GRANTED TO THE UNITED STATES BY 33 U.S.C. §702(C) DOES NOT INCLUDE CONSEQUENTIAL DAMAGES AND DAMAGES FOR PERSONAL INJURIES.

After the great flood of 1927, Congress recognized the need to enact legislation for the control of flooding on the Mississippi River. This flood killed more than 246 people, left over 700,000 people homeless, killed over a million and a half farm animals, and inundated over 18,000 square miles of land. Against this backdrop of loss of life and property two plans were developed to resolve the problem of flooding on the Mississippi River. One was formulated and proposed by Major General Edgar Jadwin, the Chief of Engineers for the U. S. Army, hereinafter referred to as the Jadwin Plan. The other was proposed by the Mississippi River Commission and will be referred to as the Commission Plan.

The plans were fundamentally the same, proposing a system of levees and spillways to solve the problem. Both also provided for diversion channels to carry excess water than the amount advisable to confine between the levees on the main river.[1] However, there was much discussion, debate, and testimony at the various hearings concerning the differences between the two and the degree of difference in the areas of agreement.

One area of concern was the subject of local contribution. The Jadwin Plan estimated the cost of the project to be $185,400,00 for flood control and $111,000,000 for channel stabilization and mapping or a total of $296,400,000. Jadwin recommended the federal government paying 80% of the total amount allocated to

---

[1]Sen. Rep. No. 619, 70th Cong., 1st Sess. p. 9 (1928); H. Rep. No. 1072, 70th Cong., 1st Sess. p. 74 (1928).

flood control works with the state and local governments paying the additional 20%. The Commission estimated the cost, however, to be $775,000,000 and allocated the entire cost of the project to the federal government. This large difference was because the Jadwin Plan did "not include the cost of rights of way for flood control works, the cost of any drainage works required therewith nor the cost of any flowage rights that may be required, nor damages, if any, resulting from the execution of the plan. No rights of way or damage arise in connection with the navigation works."[2] Thus, the Jadwin Plan called for the federal government to pay $258,960,000 and the local interests to pay $37,440,000. Additionally, Jadwin states, "The local interests are also expected, under the project, to furnish for flowage easements and damages."[3] Congress, when faced with the question of whether the United States or the individual states and local agencies should bear the major cost of the flood control program, reached a compromise, the states would be required to provide all of the rights of way necessary for the construction of the flood-control works, but would not be required to expend any additional monies. The United States would provide for the full cost of the construction of the project. By waiving further state contribution, the United States assumed a greater financial responsibility than it had initially planned. Therefore, in making this compromise, it became necessary for the United States could be held liable. With this type of limitation of liability necessary, Congress enacted as a part of Section 702(C) the following:

> No liability of any kind shall attach to or rest upon the United States for any damages from or by floods or flood waters at any place.

---

[2]Sen. Rep. No. 619, 70th Cong., 1st Sess. p. 18 (1928).

[3]Id. at 21.

This clause has been judicially misinterpreted for over thirty years.[4] Having failed to adequately investigate the intent of the drafters of this disclaimer, the Eighth Circuit Court of Appeals erroneously concluded that the government had total, complete immunity. This mistake once made has continued, gaining credibility with each new decision.[5]

In analyzing the debates and committee testimony associated with the passage of 33 U.S.C. §702(C) the question of damages arose frequently. In each instance however, it concerned the acquisition or taking of property and who would pay for it.[6] The history of the disclaimer clause makes this all too clear. It began in Senate Bill 3740, Section 4 providing for "compensation for property used, taken, damaged or destroyed in executing the project, and

---

[4]*National Manfacturing Company v. United States,* 210 F.2d 263 (8th Cir. 1954), cert. den. 347 U.S. 967, 74 S. Ct. 778, 98 L. Ed. 1108 (1954) and its progeny. None of the courts involved in these cases delved into the Congressional history of 33 U.S.C. §701(c). The Eighth Circuit looked to the debates and testimony before Congressional Committees after the Kansas flood of 1951, but failed to look to the intent of the drafters of the 1928 act. Had they done so, they might likely have reached the same conclusion as the majority herein, that "damages" refers to those associated with the acquisition and taking of property and not consequential damages.

[5]*Graci v. United States,* 456 F. 2d 20 (5th Cir. 1971); *Florida East Coast Railway v. United States,* 519 F. 2d 1184 (5th Cir. 1975).

[6]President Calvin Coolidge in his report to Congress on December 8, 1927, addressed the damage issue involved in the construction of the project. He states, "It is aximatic that States and other local authorities should supply all land and assume all pecuniary responsibility for damages that may result from the exection of this project." S. Rep. No. 619 at 12. Maj. Gen. Jadwin also considered the damages to encompass those involved in the construction of the project. In computing the totalcost of the project, he emphasizes that it "does not include the costs of rights of way for flood control works, the cost of any drainage works required therewith nor the cost of any flowage the execution of the plan. Id. at 13, 18. This theme concerning damages in echoed thoughout the presentation of his plan. In his

for damages to public service corporations through the necessity of adjusting or relocating properties to conform to the project, with the proviso that benefits resulting from the project may be weighed against damages caused by it.[7] This included expenses to railroads or others in changing their property.[8]

Section 4 came under heavy attack because of its compensation clauses which provided governmental liability for damages greatly exceeding those constitutionally mandated. Congressman Reid and Koch both opposed it because it would increase litigation and cause increased losses to the government. They felt it overly burdensome and would greatly enlarge the costs already incurred in normal expropriations.[9]

---

summary of the project, he explains that the States must meet three criteria before any funds are expended within that state:

1. Provide without cost to the United States, the rights of way for all levee structures and drainage works,
2. Consent to maintain the levee at the head of the floodways,
3. **Agree to hold and save the United States free from all damage claims resulting from the construction of the project.** Id. at 44. (Emphasis added)

Mr. Leroy Percy of Greenville, Mississippi, in commenting on the Jadwin proposal makes the following comment concerning the acquisition of property and the payment for it:

> The acquisition of flowage rights by the State or local lands should remain in private ownership in order that their productive capacity may be fully availed of. The United States does not in general own the bed of navigable streams; much less need it own land flooded only at long intervals. Damages, if any, which may be found legal and proper as a consequence of the plan should be met by the States, since these will be directly benefited by the works. Sen. Rep. No. 619, 70th Cong., 1st Sess., p. 19 (1928)

[7]H. R. Rep. No. 1100, 70th Cong., 1st Sess. p. 3 (1928)

[8]Id. at 12.

[9]Representative Koch:

> Section 4 contains vicious provisions. Who the author was of said Section 4 I do not know, but I feel very certain that it originated in some railroad office. The purpose of that section is to give the railroads in the Mississippi Valley an unfair and unjust advantage. If left in the bill it will make the railroads a present of many millions of dollars over and above just compensation. Under the Constitution, as provided in the Fifth Amendment thereto, private property cannot be taken for public use without just compensation. That phrase fixes the damages to which everybody is entitled in concemnation proceedings when property is taken for public use by the United States Government. . . The retention of section 4 as it now reads will mean a vast amount of litigation and ultimately great loss to the Government. In any event, why should anybody be given more than the Constitution of the United States plainly directs? Everybody is entitled to just damages, and the courts of the country have interpreted that phrase many times and have laid down rules for ascertaining just damages. All of the language in section 4 of the bill enlarging the rule of damages fixed by the Constitution of the United States should be striken out.
>
> Congressional Record—House (70th Cong., 1st Sess.) 6712 (March 28, 1928)

It is clear from the House debate that the only damages which Congress was concerned with paying were those to which citizens were entitled pursuant to the Consitution, those related or consequent to the taking or private property for public purposes. It was not mentioned at any time in any congressional debate that consequential damages in tort were recoverable and should be excluded in the passage of the Act.

In a conference committee, Section 4 was modified by two amendments as follows:

> Amendment 15:
>
> The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: Provided, that in all cases where the execution of the flood control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid.

Amendment 14:

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: Provided, however, That if in carrying out the purposes of this act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands."[10]

This was the first such disclaimer of liability for "damages" to appear. Congressman Frank Reid of Illinois

---

Congressman Reid:

> This section is very vicious and might prove very disastrous to the country. The provisions in it would require the Government to pay money for the rebuilding of railroads and other public corporations, and if a village should be interrupted by the building of a flood way within its limits the Government would be responsible.
>
> There is now a provision in the law whereby citizens may receive just compensation in the courts and that should be sufficient. But to commit the Government to a provision fraught with danger and enormous expenditures from which scandals may accrue would be unreasonable. It might in time reflect back to Congress, and therefore, it is my opinion that this section should be eliminated entirely.

Congressional Record—House (70th Congress 1st Session) 6718 (April 18, 1928)

[10]S. Doc. No. 91, 70th Cong., 1st Sess. 1 (1928) (Conference Report)

wanted it clearly set forth in the Act that the Government was not opening itself up to those extended liabilities (above those allowed by the Constitution) originally set forth in Section 4 of the Senate version which would have the Government responsible for all rights of way and damages, including expenses to railroads or states in the changing of their property. Those types of extended damages which the Government could not afford to assume and the types of damages Congress wanted to make certain were clearly excluded in the passage of the Act.

In testimony during the hearings on the various bills, in the reports of the committees, and of Maj. Gen. Jadwina and the Mississippi River Commission, damages are always used in the context of the construction of the flood control project. The references all discuss compensation for the taking of land, use of land, or relocation of public service corporation property. There is no discussion of consequential damages resulting from flooding and any liability therefrom. In 1928 when this act was passed the federal government was immune from suit in tort. It was not until the enactment of the Federal Tort Claims Act in 1946 (some eighteen years later) that the government could be sued for this type of consequential damage. The type of damage envisioned and contemplated in all these proceedings and subsequently in 33 U.S.C. §702(C) was explained by H. Generes Dufour, and attorney from New Orleans and a member of the Mayor's Flood Policy Committee in the City of New Orleans appearing before the Senate Committee on Commerce, who stated:

> Let me remove any misconception as to what is meant by the term 'damages.' They are not speaking of damages in the sense of those consequential damages that may result from a break of a levee in the future which may overflow some places. It is settled by the jurisprudence of the United States Supreme Court that neither the Federal Government nor the State is

responsible for damages resulting from a break in a dam or levee. The damage that is spoken of in the proposal is the damage in the taking. You may not take the right of way on which a railroad is built in the sense that you take the fee, but when you cause that railroad to be moved or reconstructed in order to create a spillway, let us say, you damage the railroad, and it is a damage in the taking; it is a damage resulting from acquisition of necessary property, whether you pay for the property and take the fee or whether you pay damages in the way of flowage right, or whether you destroy a railroad or other property. It is the constitutional protection against the taking of property without just compensation against the taking or property without just compensation which is involved, and not the consequential damage in the future resulting from the failure of the protective works."[11]

The "damages" contemplated by the various parties and groups involved in this vast flood control project were not consequential damages. From the inception of the project, all of the witnesses, politicians, engineers, and others were concerned with the cost involved in the construction of the projects. These included the acquisition of land, acquisition of servitudes for drainage or flowage rights, and damages for the relocation of public service corporations. There is no mention of the consequential damages which now are before the court. The original panel which considered this case did what no other court before it had done. It dove into the thoughts and minds of those who drafted the Flood Control Act, and those who were to be effected by it. In so doing, they discovered the true meaning of the term "damages" as it exists in the act and the intent of those who placed it there.

---

[11]Hearings Before the Committee on Commerce, U. S. Senate, 70th Cong., 1st Sess., Relative to Flood Control of the Mississippi River, January 23 to February 24, 1928, p. 73.

CONCLUSION

Certiorari should not be granted in this case because the historiographic analysis by the original panel and by the court sitting en banc shows that the damages contemplated by the statute do not include those for which plaintiff is seeking redress. Therefore, the government is not immune from the damages sued upon.

Respectfully submitted,

D'AMICO, CURET & DAMPF

By: J. Michael McDonald
Sam J. D'Amico
263 Riverside Mall, Suite 610
Baton Rouge, Louisiana 70801
Telephone: (504) 387-2273

Counsel for Respondent
Susan B. Claróy, individually and
as natural tutrix of the minors, Bridget
Marie Clardy and Kenneth Clardy.

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
JAN 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-434

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLOTTE JAMES

UNITED STATES OF AMERICA, PETITIONER

v.

KATHY BUTLER, INDIVIDUALLY AND AS SURVIVING WIFE AND HEIR OF EDDY BUTLER

UNITED STATES OF AMERICA, PETITIONER

v.

SUSAN B. CLARDY, INDIVIDUALLY AND AS NATURAL TUTRIX OF THE MINORS, BRIDGET MARIE CLARDY AND KENNETH CLARDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

ANDREW J. PINCUS
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether 33 U.S.C. 702c, which provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place," bars respondents from recovering damages under the Federal Tort Claims Act for injuries allegedly caused by the release of flood waters from federal flood control projects.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases – Continued: Page

Constitution and statutes: Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-434

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLOTTE JAMES

UNITED STATES OF AMERICA, PETITIONER

v.

KATHY BUTLER, INDIVIDUALLY AND AS SURVIVING WIFE AND HEIR OF EDDY BUTLER

UNITED STATES OF AMERICA, PETITIONER

v.

SUSAN B. CLARDY, INDIVIDUALLY AND AS NATURAL TUTRIX OF THE MINORS, BRIDGET MARIE CLARDY AND KENNETH CLARDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-38a) is reported at 760 F.2d 590. The opinion of the court of appeals panel (Pet. App. 39a-58a) is reported at 740 F.2d 365. The opinions of the district courts (Pet. App. 59a-65a, 66a-76a) are unreported.

JURISDICTION

The judgments of the en banc court of appeals (Pet. App. 77a-80a) were entered on May 16, 1985. On August 6, 1985, Justice White extended the time for filing a petition for a writ of certiorari to and including September 13, 1985. The petition was filed on that date and was granted on November 12, 1985. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTE INVOLVED

33 U.S.C. 702c provides in pertinent part:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of sections 702a, 702b to 702d, 702e to 702g, 702h, 702i, 702j, 702k, 702*l*, 702m, and 704 of this title it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of the Army and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

STATEMENT

1. a. The Millwood dam and reservoir, a federal project located in the State of Arkansas, is operated by the Army Corps of Engineers. One of the purposes of the

project is the control of flood waters. Pet. App. 67a, 75a. On June 8, 1979, the reservoir's water level was at "flood stage" (*id.* at 68a). The project "was in flood control status, and water was being discharged [from the reservoir] through the tainter gates of the dam structure at the rate of approximately 24,000 cubic feet per second. The water being discharged had been previously entrapped as part of the flood control function of the facility" (*id.* at 67a-68a).

Respondents Charlotte James and Kathy Butler were water skiing on the Millwood reservoir on June 8, 1979. The current created by the discharge of water from the reservoir drew respondents and the boat containing their companions toward the dam. Respondents were pulled through the dam's gates; respondent Butler's husband drowned attempting to assist his wife. The boat became lodged in the gates and its remaining passengers were rescued. Pet. App. 68a.

Respondents James and Butler filed separate actions in the United States District Court for the Eastern District of Texas seeking damages under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* The district court found that the government had violated the duty of care imposed by Arkansas law by "willful[ly] and malicious[ly]" failing to warn respondents of the danger from the current created by the discharge of water through the dam. Pet. App. 70a-72a. The court stated that buoys normally were placed in the reservoir to mark the area of strong current but that government employees were aware that the buoys were not in place on June 8 (*id.* at 68a-69a). The court determined that respondents suffered damage in the amounts of $1 million for Kathy Butler and $40,000 for Charlotte James (*id.* at 70a).

The district court nonetheless entered judgment in favor of the United States on the ground that the government was immune from liability under 33 U.S.C. 702c, which

provides in pertinent part that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place" (see Pet. App. 67a, 72a). The court found that the Millwood dam's tainter gates had been opened for flood control purposes and that respondents' injuries therefore were caused by "flood control waters" (*id.* at 67a-68a, 72a).

b. The Courtableau Drainage Structure, a flood control project located in the State of Louisiana, is operated by the Army Corps of Engineers. The structure contains gates that can be opened to divert water through the West Atchafalaya Basin Protection Levee in order to prevent the water level of the Bayou Courtableau from rising nigher than the levee. Pet. App. 61a, 63a. On May 17, 1980, the structure's gates were opened because the water level " 'would have caused flood conditions and flooding landside of the levee if the gates of the Courtableau Drainage structure had not been opened' " (*id.* at 61a (citation omitted)). Kenneth Clardy and his father, Joseph Clardy, were fishing in the Bayou Courtableau on May 17, 1980. Their boat was caught in the current created by the open drainage gates, the boat overturned, and Kenneth Clardy drowned. *Id.* at 4a.[1]

Respondent Susan B. Clardy, Kenneth Clardy's wife, commenced an action in the United States District Court for the Western District of Louisiana seeking damages under the Federal Tort Claims Act. She alleged that the Corps of Engineers failed to post adequate warnings of the danger from the current caused by the open gates. The district court granted summary judgment for the government, holding that the government was immune from liability under 33 U.S.C. 702c (see Pet. App. 59a-63a). The court found that the drainage structure's gates had been opened in order to prevent flooding and that excess waters that create the potential for flooding are "flood

[1] The district court opinion erroneously identifies Joseph Clardy as the decedent (Pet. App. 60a-61a).

waters" within the meaning of Section 702c. It concluded that Section 702c immunized the government from liability for damage caused by the release of such waters (Pet. App. 62a).

2. The cases were consolidated on appeal and the court of appeals panel affirmed (Pet. App. 39a-58a). The panel observed that Section 702c consistently had been interpreted to bar the imposition of liability upon the government for damage related to flood control projects (Pet. App. 42a-47a), and stated that this interpretation of the statute presented an "insurmountable" barrier to respondents' claims because their injuries plainly were related to flood control projects (*id.* at 47a-48a).

Despite the "floodtide of authority" supporting this result and "the sometimes-heard argument that Congress has signaled its agreement with [this] statutory construction by leaving the statute unchanged," the panel expressed its view that previous courts had erred in interpreting Section 702c to bar damages claims similar to respondents' claims in these cases (Pet. App. 49a). Relying upon its interpretation of Section 702c's legislative history, the panel concluded that the provision was intended by Congress to disclaim only "liability for 'takings' and not liability for consequential damages" (Pet. App. 55a). In the panel's view, therefore, "the Federal Tort Claims Act should subject the United States to tort claims for flood control projects 'in the same manner and to the same extent as a private individual under like circumstances' " (*id.* at 56a (citation omitted)). The panel affirmed the district courts' judgments in favor of the government because it was bound to apply the broader interpretation of Section 702c previously adopted by panels of the Fifth Circuit (Pet. App. 57a).

3. The full court of appeals ordered rehearing of the cases en banc and reversed the district courts' judgments by a divided vote (Pet. App. 1a-38a). The majority con-

cluded that the language of Section 702c contained "latent ambiguities" necessitating reference to the legislative history in order to ascertain the scope of Section 702c (Pet. App. 5a).

The en banc court's analysis of Section 702c's legislative history differed somewhat from the result reached by the panel (see Pet. App. 11a-20a). The court stated that in enacting the Flood Control Act of 1928, which contained Section 702c, "Congress was concerned with allocating the costs of a major public works program between the federal government and the state and local interests, both public and private" (Pet. App. 12a). It concluded that Congress intended Section 702c to immunize the federal government from liability for damage resulting directly from construction of flood control projects and from liability for flooding caused by factors beyond the government's control (Pet. App. 8a, 17a-20a), but that it was "doubtful that Congress intended to shield the negligent or wrongful acts of government employees—either in the construction or in the continued operation" of flood control projects (*id.* at 18a-19a).

Turning to prior judicial interpretations of Section 702c, the en banc court rejected the unanimous conclusion of other courts of appeals that Section 702c confers immunity from liability for all damage resulting from flood control efforts (Pet. App. 21a-27a). The court concluded that "the limitations on the immunity should be elaborated more particularly" (*id.* at 27a). It stated (*id.* at 27a-28a):

> The government is not liable for any fault of its employees in controlling floodgates or managing lands to contain, prevent, or manage floods or floodwaters. This immunity, however, does not extend to the fault of government employees in failing to warn the public of the existence of hazards to their accepted use of government-impounded water, or nearby land.

Thus, "[i]f a producing cause of the damage or injury is a government employee's negligence in omissions or commissions that diverge from acts strictly for the purpose of controlling floods or floodwaters, and the presence or movement of water for flood control purposes merely furnishes a condition of the accident, there is no section 702c immunity" (*id.* at 28a).

The en banc court held that this standard required reversal of the district courts' judgments in these cases. It stated that the claims asserted by respondents James and Butler were based upon injuries resulting from the government's failure adequately to warn of the danger of the current in the reservoir. The court concluded that Section 702c did not bar these claims, apparently because it viewed the breach of a duty to warn recreational users of a danger arising from the discharge of flood waters as an omission that "diverge[d]" from the government's flood control responsibilities. Pet. App. 28a-29a. The court remanded the action for entry of a judgment consistent with its opinion (*id.* at 30a). With respect to respondent Clardy, the court remanded to allow the development of facts concerning the adequacy of the warning of the danger resulting from the discharge of flood waters (*id.* at 29a).

Six judges dissented. Judge Gee, writing for himself and Judges Garwood, Jolly, Davis and Hill, stated that the majority's decision was contrary to the "the statute's plain words and, insofar as I can understand the holding, simply brushes them aside and substitutes for them the court's notion of good policy" (Pet. App. 32a). Judge Gee "disagreed with [the majority's] massive judicial recasting of Congressional intent," observing that "[b]oth the language of § 702c and the legislative history" showed that Congress intended to limit the government's total financial exposure as a result of a flood control program of "unprecedented scope and laden with foreseeable and unforeseeable prospects of liability" (*id.* at 34a-35a). He

noted that this was the unanimous view of previous appellate decisions construing Section 702c and that this "construction has stood for three decades without any sign of Congressional dissatisfaction" (Pet. App. 36a). Judge Gee concluded that respondents' claims were barred under this interpretation of the statute. *Id.* at 34a-36a.

Judge Higginbotham filed a separate dissenting opinion. He stated that "[w]ithout clear evidence of what Congress meant to do in 1928 [when Section 702c was enacted], I would defer to the longstanding and unanimous construction placed on § 702c by this and other courts—a construction which has given specific and unambiguous content to the clause. The majority has not made the case for turning about at this date, regardless of any ambiguity of § 702c as an original proposition" (Pet. App. 38a).

SUMMARY OF ARGUMENT

This case concerns the scope of the government's immunity from liability for damage resulting from the release of flood waters from a federal flood control project. Congress specifically addressed this question in 1928 when it first determined that the federal government should assume complete responsibility for efforts to control flooding by the Nation's rivers. The statute initiating this public works program contained an express, comprehensive affirmation of the government's sovereign immunity: "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place" (33 U.S.C. 702c).

Section 702c clearly establishes a sweeping rule of immunity from damages liability. Congress's consistent use of the term "any," referring to "liability of *any* kind" and "*any* damage" (emphasis added), demonstrates beyond a doubt that Section 702c confers all-encompassing immunity from liability in the flood control context. An exception

to this broad rule could be created only by "ignor[ing] the ordinary meaning of plain language." *TVA* v. *Hill*, 437 U.S. 153, 173 (1978). Indeed, every appellate court to construe Section 702c other than the court below has recognized this fact, holding that the provision is an absolute bar to the imposition of liability for damage relating to a flood control project.

The court of appeals stated that the statute could not be interpreted according to its plain meaning because Section 702c contains "latent ambiguities" (Pet. App. 5a). However, there is no basis for finding ambiguity in the clear command of this statute. The court of appeals itself created the purported ambiguities by failing to follow the "fundamental canon of statutory construction * * * that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). When this rule of construction is applied to Section 702c, it is clear that the statute unambiguously bars respondents' attempt to impose liability upon the United States for damage incurred as the result of the release of water from a flood control project.

Moreover, the legislative history of Section 702c confirms that Congress intended to confer comprehensive immunity from liability when it enacted the provision. The statute that included Section 702c was passed in response to the disastrous Mississippi River flood of 1927. Congress decided that a comprehensive federal flood control program was the only effective way to eliminate the threat posed by flood waters. In view of the large expense involved in this public works project—and the vast harm that potentially could be caused by flood waters—Congress limited the federal government's financial exposure, making clear that the government assumed responsibility only for the direct costs of constructing the flood control structures and not for any damage caused by

flood waters. Section 702c thus is an express affirmation of Congress's decision to limit the government's monetary liability in connection with the flood control program. This policy judgment mandates construing Section 702c to immunize the government from tort liability for damage caused by the release of flood waters, such as the damage for which respondents seek recovery here.

The restrictive interpretation of Section 702c adopted by the court of appeals is not supported by either the language of the statute or the legislative history. It rests solely upon the court's judgment that it is appropriate to impose liability upon the United States in this context. However, Congress determined that the federal government would embark upon the flood control program only if the federal treasury was not thereby required to provide compensation for damage caused by flood waters. The court of appeals plainly erred by relying upon its own policy judgment to "justify its disregard of a clear congressional directive." *Central Trust Co.* v. *Official Creditors' Committee of Geiger Enterprises, Inc.*, 454 U.S. 354, 359 (1982) (per curiam).

Even if the legislative history of Section 702c were ambiguous regarding the application of the statute in the circumstances presented in this case, the court of appeals erred by rejecting the settled, unanimous construction of the provision. This Court several times has approved an interpretation of a statute supported by "long-standing [judicial] interpretation and • • • continued congressional silence." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200-201 (1974). Since the courts of appeals for over 30 years have agreed upon the proper interpretation of Section 702c, "[t]he task of changing such a settled construction should now be left to Congress." Pet. App. 38a (Higginbotham, J., dissenting).

ARGUMENT

33 U.S.C. 702c IMMUNIZES THE UNITED STATES FROM LIABILITY FOR ANY DAMAGE RESULTING FROM THE RELEASE OF FLOOD WATERS FROM A FEDERAL FLOOD CONTROL PROJECT

Floods are among the most dangerous forces found in nature. Virtually uncontrollable when unleashed, they can inflict tremendous damage upon both people and property, and have resulted in many tragic chapters in our Nation's history. Congress was well aware of the great danger posed by floods when it determined in 1928 that only a comprehensive plan implemented by the federal government could tame the flood waters that long had plagued the Mississippi River Valley. Congress therefore made clear that its decision to embark upon this vast public works project did not mean that the federal government would provide compensation for damage caused by flood waters. The statute establishing the flood control program included 33 U.S.C. 702c—a comprehensive affirmation of the government's immunity from liability for damage caused by flood waters. The plain language of Section 702c, and Congress's underlying purpose, are so clearly directed toward this goal that prior to the decision below every appellate court to address the question had construed Section 702c as conferring complete immunity upon the United States for all damage caused by the release of flood waters from a federal flood control project.

The court below rejected the plain language, legislative history, and settled judicial interpretation of Section 702c and held the federal government liable for damage resulting from releases of flood waters from federal flood control projects. It reached this unprecedented result even though the district court in each case found that the release of water from the project was a flood control measure. As

one of the dissenting judges below observed, the decision simply "substitutes for [the statute's plain words] the court's notions of good policy" (Pet. App. 32a (Gee, J., dissenting)). Congress's policy determination must prevail, however, and Section 702c therefore should be interpreted to bar respondents' claims.[2]

A. Section 702c's Plain Language Unambiguously Bars Liability For All Damage Caused By The Release Of Flood Waters

Section 702c sets forth a comprehensive rule of immunity: "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." In analyzing the effect of this provision, "[t]he starting point * * * must, of course, be the language of [the statute]. '[W]e assume "that the legislative

---

[2] Section 702c was enacted as part of the statute establishing the federal flood control program, but the provision is not by its terms restricted to damage relating in some way to a federal flood control project. Some courts have stated that Section 702c does not apply when damage is caused by an act that is "wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control, or any act undertaken pursuant to any such authorization." *Peterson* v. *United States*, 367 F.2d 271, 275 (9th Cir. 1966); see also *Morici Corp.* v. *United States*, 681 F.2d 645, 647-648 (9th Cir. 1982); *Hayes* v. *United States*, 585 F.2d 701, 702-703 (4th Cir. 1978); *Graci* v. *United States*, 456 F.2d 20, 26-27 (5th Cir. 1971). In *Peterson*, for example, the court held that Section 702c did not confer immunity from liability because the plaintiff's claim was based upon a flood that resulted from the dynamiting of an ice jam by government employees. Other courts have interpreted the provision more broadly. *National Manufacturing Co.* v. *United States*, 210 F.2d 263 (8th Cir.), cert. denied, 347 U.S. 967 (1954). This case does not present an occasion for resolving this issue concerning the scope of Section 702c because the damage for which respondents seek compensation plainly resulted from the operation of federal flood control projects. Thus, the government would be immune from liability even under the narrower interpretation of Section 702c adopted by some courts of appeals.

purpose is expressed by the ordinary meaning of the words used." ' " *Kosak* v. *United States*, 465 U.S. 848, 853 (1984) (quoting *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982)).

The scope of Section 702c could not be broader; Congress utilized all-encompassing phrases such as "liability of *any* kind," "*any* damage," and "*any* place" (emphasis added). The term "any" generally means a thing "selected without restriction or limitation of choice"; when used as a modifier as in Section 702c "any" indicates "the maximum or whole of a number or quantity" (*Webster's Third New International Dictionary* 97 (4th ed. 1976)). Thus, Congress's references to "any" kind of liability for "any" damage at "any" place must mean that Section 702c confers upon the United States blanket immunity from damages liability in the flood control context. See *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 588-589 (1980); *Shea* v. *Vialpando*, 416 U.S. 251, 260 (1974); *United States* v. *Rosenwasser*, 323 U.S. 360, 363 (1945). Indeed, as Judge Gee demonstrated in his dissenting opinion (Pet. App. 31a-32a), any attempt to make the provision *more* comprehensive would "serve[ ] small purpose beyond making the enactment read like an insurance company's form general release rather than a statute."

In view of the statute's clear directive, it is not surprising that every court of appeals other than the court below has interpreted Section 702c's broad language to bar the imposition of tort liability upon the United States for all damage resulting from flood control activities. See, *e.g.*, *Portis* v. *Folk Construction Co.*, 694 F.2d 520, 522 (8th Cir. 1982) (Section 702c "assure[s] the government of absolute immunity for [damage caused by flooding related to] flood control projects"); *Morici Corp.* v. *United States*, 681 F.2d 645, 647 (9th Cir. 1982) ("if [the

plaintiff's] injury resulted from the operation of [a] federal project for flood control purposes, government immunity is complete"); *Callaway* v. *United States*, 568 F.2d 684, 687 (10th Cir. 1978) (rejecting arguments that Section 702c did not apply to flood damage resulting from the operation of a flood control project in view of "broad and emphatic language of § 702c"); *Parks* v. *United States*, 370 F.2d 92, 93 (2d Cir. 1966) (same); *National Manufacturing Co.* v. *United States*, 210 F.2d 263 (8th Cir.), cert. denied, 347 U.S. 967 (1954).[3] Prior to the en banc court's decision in this case, the Fifth Circuit also adhered to this view. See *Florida East Coast Ry.* v. *United States*, 519 F.2d 1184, 1192 (5th Cir. 1975) (footnote and citation omitted) (Section 702c grants immunity from liability for damage resulting from flood waters in "the broadest and most emphatic language").

The court of appeals' contrary decision rests in large part upon its conclusion that Section 702c contains "latent ambiguities" (Pet. App. 5a). Given the plain language of Section 702c, however, "it requires some ingenuity to create ambiguity." *Rothschild* v. *United States*, 179 U.S. 463, 465 (1900). The discovery of "ambiguities" undetected by any of the other appellate courts that have construed Section 702c appears to be a product of the court of appeals' eagerness to adopt a narrow construction of the statute rather than the result of an objective evaluation of the statute's terms. See Pet. App. 32a (Gee, J., dissenting);

[3] See also *Pierce* v. *United States*, 650 F.2d 202 (9th Cir. 1981); *Aetna Insurance Co.* v. *United States*, 628 F.2d 1201 (9th Cir. 1980), cert. denied, 450 U.S. 1025 (1981); *Burlison* v. *United States*, 627 F.2d 119 (8th Cir. 1980), cert. denied, 450 U.S. 1030 (1981); *Taylor* v. *United States*, 590 F.2d 263 (8th Cir. 1979); *Lenoir* v. *Porters Creek Watershed District*, 586 F.2d 1081 (6th Cir. 1978); *McClaskey* v. *United States*, 386 F.2d 807 (9th Cir. 1967); *Stover* v. *United States*, 332 F.2d 204 (9th Cir.), cert. denied, 379 U.S. 922 (1964); *Clark* v. *United States*, 218 F.2d 446 (9th Cir. 1954).

cf. *TVA* v. *Hill*, 437 U.S. 153, 173 n.18 (1978) (unjustified assertions of ambiguity do not transform a clear statute into an ambiguous provision).

For example, the court of appeals found that the word "damage" was ambiguous, because it might refer only to damage to property and exclude damage to persons (Pet. App. 7a & n.7). But the ordinary meaning of the word carries no such limitation. "Damage" means "loss due to * * * injury or harm to person, property, or reputation." *Webster's Third New International Dictionary*, *supra*, at 571; see also *Black's Law Dictionary* 351 (5th ed. 1979) (damage is a "[l]oss, injury, or deterioration" caused by "one person to another, in respect of the latter's person or property. * * * By damage we understand every loss or diminution of what is a man's own, occasioned by the fault of another"); *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446, 450 (1947) (the term "damages" includes compensation for both injury to property and injury to persons).[4] Moreover, the term "damage" does not stand alone in the statute. Congress referred to "*any* damage" and "[n]o liability of *any* kind" (33 U.S.C. 702c (emphasis added)). This express adoption of the broadest possible meaning of the term precludes the narrow construction suggested by the court of appeals.[5]

[4] "Damage" carried the same meaning at the time Section 702c was enacted. Thus, treatises of the time characterized both harm to person and harm to property as "damage." See J. Sutherland, *A Treatise on the Law of Damages* (J. Berryman 4th ed. 1916); T. Sedgwick, *A Treatise on the Measure of Damages* (9th ed. 1912).

[5] The fact that the other appellate decisions construing Section 702c concerned suits seeking to impose liability upon the United States for damage to property does not support the court of appeals' narrow construction of the statute. Pet. App. 19a n.16. Those decisions do not draw any distinction between damage to property and damage to persons.

The court below also stated that it was not "clear why 'at any place' was tacked on to the sentence, inasmuch as the immunity language is already comprehensive without it" (Pet. App. 7a (footnote omitted)). The court hypothesized that Congress might have meant to refer to damage "to any place," thereby limiting the provision to property damage, but there is absolutely no basis for interpreting this straightforward phrase in such a peculiar manner. Congress wrote "at," not "to," and plainly was referring to the location of the flood waters, not the sort of damages liability barred by the immunity provision. There can be no question about the justification for including the phrase in the statute. The court of appeals itself suggested the reason: Congress wanted to ensure that Section 702c was as comprehensive as possible so that the government would not be subjected to monetary liability for any damage related to flood waters.[6]

Finally, the court of appeals stated that the terms "flood" and "floodwaters" were ambiguous because they could refer either to all waters held in flood control structures or " 'waters that are out of control' " (Pet. App. 7a & n.6 (citation omitted)). Even if this observation were correct, any possible ambiguity would be irrelevant in this case because the district courts both held that respondents were injured by waters that were at flood level (*id.* at 61a, 63a, 67a-68a), and the court below "assume[d] that the waters in this case were floodwaters" (*id.* at 7a n.6).

[6] The court of appeals also stated (Pet. App. 6a-7a n.5) that the Congress that enacted Section 702c considered the immunity provision ambiguous, but the authorities cited by the court do not support this assertion. There is no reference to Section 702c in the portion of the congressional debates quoted by the court of appeals (see 69 Cong. Rec. 8187 (1928) (remarks of Sen. King)). In addition, the committee report cited by the court states that the proviso of Section 702c was amended to clarify its meaning; the report does not refer to the portion of the statute setting forth the government's immunity from liability (see 69 Cong. Rec. 8119 (1928)).

Moreover, "flood" is defined as "a rising and overflowing of a body of water that covers land not usually under water" (*Webster's Third New International Dictionary, supra,* at 873). Since Congress was legislating with respect to flood control projects designed to carry flood waters, the conclusion is inescapable that the statute refers to all waters contained in or carried through such structures as well as waters the structures could not retain.[7]

In sum, the court of appeals found the statute ambiguous only because it failed to look to "the ordinary meaning of the words used." *Richards* v. *United States,* 369 U.S. 1, 9 (1962); see also *Perrin* v. *United States,* 444 U.S. 37, 42 (1979) ("[a] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary,

[7] The court of appeals elaborated on this supposed ambiguity by discussing several hypothetical situations in which Section 702c allegedly might not apply because the damage that formed the basis for the tort claim might not be related to the operation of a flood control project (Pet. App. 8a-10a). However, this issue is irrelevant here because the damage for which respondents seek to impose liability on the government *did* result from the release of flood waters from a federal flood control project. Any question regarding the application of Section 702c in the very different circumstances hypothesized by the court of appeals cannot render the statute ambiguous with respect to its application in the situation now before the Court. See note 2, *supra.*

The court of appeals also suggested (Pet. App. 10a) that Section 702c is ambiguous because the provision bars the payment of compensation for a taking of property by the government, and the statute would be unconstitutional if it actually had this effect. However, the Flood Control Act itself makes clear that Section 702c does not bar such payments; it expressly authorizes compensation for flowage rights (see pages 26-27, *infra*). Moreover, the fact that Section 702c must be construed to permit payments required by the Fifth Amendment does not render the statute ambiguous with regard to the government's liability for damage for which compensation is not constitutionally required.

common meaning"). Section 702c actually contains no ambiguities; its plain language immunizes the United States from all liability for all damage caused by flood waters.

This Court repeatedly has recognized that "[w]hen * * * the terms of a statute [are] unambiguous, judicial inquiry is complete, except 'in "rare and exceptional circumstances." ' " *Rubin* v. *United States*, 449 U.S. 424, 430 (1981) (citations omitted); see also *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 570-571 (1982); *Central Trust Co.* v. *Official Creditors' Committee of Geiger Enterprises, Inc.*, 454 U.S. 354, 359-360 (1982) (per curiam). In *TVA* v. *Hill, supra*, the Court applied this rule in interpreting another provision with "terms [that] were * * * plain[]" and "language admitt[ing] of no exception" (437 U.S. at 173). The Court refused to create an exception to the broad statutory rule because "[t]o sustain that position * * * [it] would be forced to ignore the ordinary meaning of plain language" (*ibid.*). It would be equally difficult to incorporate an exception to the all-encompassing immunity from liability provided by Section 702c. Indeed, this conclusion is inescapable in the present case because the damage for which respondents seek compensation unquestionably was caused by the release of flood waters from a flood control project. Respondents' claims thus fall squarely within the terms of Section 702c.

Furthermore, this Court should give full effect to the unambiguous mandate of Section 702c because a review of the provision's legislative history reveals no "clearly expressed legislative intention to the contrary." *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); see also *Escondido Mutual Waters Co.* v. *La Jolla Band*, No. 82-2056 (May 15, 1984), slip op. 6; *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103, 110 (1983). As we discuss below, the legislative history of Section 702c in fact confirms that Congress meant what it said: the government is immune from liability for *any* damage caused by flood

waters other than the specific costs that Congress expressly agreed to shoulder when it embarked upon the flood control program.[8]

B. The Legislative History Confirms That Section 702c Should Be Interpreted In Accordance With Its Plain Meaning

The Flood Control Act of 1928, the statute that includes Section 702c, was enacted in response to the 1927 Mississippi River flood, the "most disastrous of all [of the river's] recorded floods." *United States* v. *Sponenbarger*, 308 U.S. 256, 261 (1939); see also H.R. Rep. 1072, 70th Cong., 1st Sess. 3, 17-18 (1928). Flooding had long been a problem for residents of the Mississippi River Valley; "[t]o enjoy the promise of [the valley's] fertile soil in safety ha[d], for generations, been the ambition of the valley's

---

[8] Although Section 702c was enacted as part of the Flood Control Act of 1928, the provision consistently has been interpreted to bar liability for damage related to federal flood control projects authorized by other statutes. See *Aetna Insurance Co.* v. *United States*, 628 F.2d 1201, 1204 (9th Cir. 1980), cert. denied, 450 U.S. 1025 (1981); *Lenoir* v. *Porters Creek Watershed District*, 586 F.2d 1081, 1086 & n.4 (6th Cir. 1978); cf. *National Manufacturing Co.* v. *United States*, 210 F.2d 263, 270 (8th Cir.), cert. denied, 347 U.S. 967 (1954).

The projects at which respondents incurred their injuries were authorized by two different statutes. The Courtableau Drainage Structure is part of a project that was authorized by the Flood Control Act of 1928, as amended in 1936 (see 33 U.S.C. 702a-4, 702a-6), and the Millwood project was authorized by the Flood Control Act of 1946 (see ch. 596, 60 Stat. 647). The court below criticized the decisions holding that Section 702c applies to projects constructed under subsequent flood control acts, but did not dispute that Section 702c is applicable to damage related to these projects (see Pet. App. 24a-25a n.23). Since Section 702c is not by its terms restricted to the projects authorized in 1928, there is no basis for the court of appeals' criticism. In view of the unconditional language of the statute, Congress undoubtedly assumed that the immunity provided by Section 702c would apply with respect to all federal flood control projects unless a different result was specified by statute.

occupants" (*Sponenbarger,* 308 U.S. at 261). Flood protection techniques for most of the nineteenth century consisted of disconnected levees along the banks of the river constructed pursuant to the "uncoordinated efforts of individuals, communities, counties, districts and States" *(ibid.).*[9]

In 1883, the federal government adopted the Eads plan, "undert[aking] to cooperate with, and to coordinate the efforts of the people and authorities of the various river localities in order to effect a continuous line of levees along both banks of the Mississippi for roughly nine hundred and fifty miles." *Sponenbarger,* 308 U.S. at 261; see also *Jackson* v. *United States,* 230 U.S. 1, 18-19 (1913). Congress established the Mississippi River Commission to coordinate these flood control efforts, but the states supplied over two-thirds of the construction costs. S. Rep. 619, 70th Cong., 1st Sess. 20 (1928).

The 1927 flood conclusively discredited the "levees-only" approach of the Eads Plan. It showed that "levees alone, though continuous, would not protect the valley from floods" because the river rose higher than the levees. *Sponenbarger,* 308 U.S. at 261; see also H.R. Rep. 1072, *supra,* at 4-5. The legislative history of the 1928 Act is replete with references to the devastation caused by the flood waters. Secretary of Commerce Herbert Hoover described the flood as " 'a disaster unprecedented in the peace-time history of our Nation' " (H.R. Rep. 1072, *supra,* at 18). More than 200 persons were killed, over 700,000 were left homeless, and property losses exceeded $200 million. H.R. Rep. 1100, 70th Cong., 1st Sess. 69 (1928); H.R. Rep. 1072, *supra,* at 3, 242-248. During

[9] A levee is an earthen embankment along a river designed to keep the river from overflowing when it rises to flood stage.

the debate on the 1928 Act, members of Congress recounted in detail the destruction visited upon their states.[10]

Congress's response to the disaster was to adopt a new comprehensive flood control plan developed by Major General Edgar Jadwin, Chief of the Army Corps of Engineers. The new plan differed from past efforts because the federal government undertook sole responsibility for flood control. The plan "provided for a comprehensive ten-year program for the entire valley, embodying a general bank protection scheme, channel stabilization and river regulation, all involving vast expenditures of public funds" (*Sponenbarger,* 308 U.S. at 262). The key element of the plan was the use of floodways to divert flood waters from the Mississippi's main channel at selected points along the river:

> The height of the levees at these predetermined points was not to be raised to the general height of the levees along the river. These lower points for possible flood spillways were designated "fuse plug levees." Flood waters diverted over these lower "fuse plug levees" were intended to relieve the main river channel and thereby prevent general flooding over the higher levees along the banks. Additional "guide levees" were to be constructed to confine the diverted flood waters within limited floodway channels leading from the fuse plugs.

[10] See 69 Cong. Rec. 8190-8191 (1928) (remarks of Sen. Caraway); *id.* at 7130-7132 (remarks of Rep. Reed); *id.* at 6724-6725 (remarks of Rep. Martin); *id.* at 6709 (remarks of Rep. Kopp); *id.* at 6706-6709 (remarks of Rep. Gregory); *id.* at 6669-6670 (remarks of Rep. Nelson); *id.* at 6651, 6654 (remarks of Rep. Whittington); *id.* at 6649 (remarks of Rep. Driver); *id.* at 6645 (remarks of Rep. Wilson); *id.* at 6642-6643 (remarks of Rep. Reid); *id.* at 5494-5495 (remarks of Sen. Harrison).

Ibid. Thus, the Jadwin Plan was "fundamentally" different from the prior approach to flood control because it was designed to "limit[] the amount of flood water carried in the main river to its safe capacity and send[] surplus water through lateral floodways" (S. Rep. 619, *supra*, at 13 (memorandum from General Jadwin)).[11]

Congress recognized that in adopting the Jadwin Plan it was embarking on a vast public works project. H.R. Rep. 1072, *supra*, at 18 ("gigantic undertaking"); 69 Cong. Rec. 6644 (1928) (remarks of Rep. Wilson) ("the greatest internal project in America"). The statute authorized $325 million for the program,[12] but estimates of the total cost of the project ranged from $500 million to over $1 billion. H.R. Rep. 1100, *supra*, at 18; S. Rep. 619, *supra*, at 11 (the $325 million authorized for the project is "simply an estimate. The actual cost of the work will, doubtless, be much more"); 69 Cong. Rec. 8194 (1928) (letter from General Jadwin); *id.* at 8187 (remarks of Sen. King); *id.* at 8182 (remarks of Sen. Frazier); *id.* at 6652 (remarks of Rep. Whittington); *id.* at 5485 (remarks of Sen. Jones).[13] Moreover, for the first time the states were not required to

[11] The Mississippi River Commission proposed its own plan for a new approach to flood control that was similar in some respects to the Jadwin Plan. Congress adopted the Jadwin Plan but created a board to evaluate the differences between the plans and directed the President to make a final decision regarding the specifics of the plan to be implemented. Act of May 15, 1928, ch. 569, § 1, 45 Stat. 534-535.

[12] Act of May 15, 1928, ch. 569, § 1, 45 Stat. 534-535.

[13] To place the program in perspective it is noteworthy that all federal expenditures in 1928 totaled less than $3 billion. Bureau of the Census, U.S. Dep't of Commerce, *Historical Statistics of the United States, Colonial Times to 1970* Pt. 2, at 1104 (1975). Since the total expenditures for fiscal year 1984 were approximately $854 billion (Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1985*, at 305 (105th ed. 1985)), a present-day program of a similar relative magnitude would amount to between $140 and $280 billion.

contribute to the cost of the flood control efforts. See Act of May 15, 1928, ch. 569, §2, 45 Stat. 535 ("no local contribution to the project herein adopted is required"); H.R. Rep. 1072, *supra*, at 21-46.[14]

In view of the project's vast scope, and this already-tremendous commitment of federal resources, one of Congress's principal concerns in drafting the legislation was to ensure that the federal government's financial liability did not extend beyond the expenditures directly necessary for the construction of the project. President Coolidge's message to Congress concerning the flood control proposals stated that "it would be very unwise for the United States in generously helping a section of the country to render itself liable for consequential damages" (69 Cong. Rec. 7126 (1928)). Similarly, a number of congressmen stated during the debates that the United States should not be liable for expenses other than the direct cost of constructing the project. See *id.* at 7028 (1928) (remarks of Rep. Spearing); *id.* at 6999-7000 (remarks of Rep. Frear).

This concern undoubtedly was intensified by the extensive evidence before Congress of the devastation wrought by the 1927 flood (see pages 20-21, *supra*). The flood control plan could not completely eliminate the possiblity of such damage and Congress did not want the federal government to be liable for any damage that did in fact occur. The chairman of the House Rules Committee stated in opening the discussion on the rule governing debate on the 1928 Act that he "want[ed] th[e] bill so drafted that it will contain all the safeguards necessary for the Federal Government. If we go down there and furnish protection to these people—and I assume it is a national responsibility—I do not want to have anything left out of the bill

[14] The final statute required the states to obtain the rights of way needed for the construction of levees, but this was not viewed as a major contribution.

that would protect us now and for all time to come. I for one do not want to open up a situation that will cause thousands of lawsuits for damages against the Federal Government in the next 10, 20, or 50 years" (69 Cong. Rec. 6641 (1928) (remarks of Rep. Snell)).

Congress thus enacted Section 702c to reaffirm the principle that the United States would not be subject to any monetary liability in connection with the flood control program other than those costs specified in the statute. A portion of the legislative history that specifically addresses the meaning of the grant of immunity contained in Section 702c confirms that the provision was viewed as a broad restatement of the government's sovereign immunity. A congressman stated that "[w]hile it is wise to insert that provision in the bill, it is not necessary, because the Supreme Court of the United States has decided * * * that the Government is not liable for any of these damages [resulting from flooding]" (69 Cong. Rec. 7028 (1928) (remarks of Rep. Spearing)).

Congress knew that the flood control program would deeply involve the federal government in an extremely hazardous activity. It wanted to confirm the general rule that the government was not liable for any damage resulting from flood waters. As the court concluded in *National Manufacturing Co.* v. *United States, supra*, the first appellate decision interpreting Section 702c, "when Congress entered upon flood control on the great scale contemplated by the [Flood Control] Acts it safeguarded the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language. The cost of the flood control works itself would inevitably be very great and Congress plainly manifested its will that those costs should not have the flood damages that will inevitably recur added to them." 210 F.2d at 270; accord Pet. App. 35a (footnote omitted) (Gee, J., dissenting) ("Congress, poised over a half-century ago on the brink of entry into a massive public works program—one of then unprecedented scope and

laden with forseeable and unforseeable prospects of liability—[intended] to state clearly that the federal treasury was to be placed at risk * * * no further than was required by the Constitution"); *Callaway* v. *United States*, 568 F.2d at 686; *Graci* v. *United States*, 456 F.2d 20, 25-26 (5th Cir. 1971); *Peterson* v. *United States*, 367 F.2d 271, 275-276 (9th Cir. 1966).[15]

Respondents seek compensation for damage resulting from the release of flood waters from a flood control project—precisely the type of claim that Congress intended to bar when it enacted Section 702c. Congress knew that the government would be engaged in the diversion and controlled release of flood waters because that was the purpose of the flood control program. In view of Section 702c's broad language and Congress's general intent to limit the government's financial liability, Congress plainly contemplated that the government would not be liable for damage caused by the operation of a project for flood control purposes. Yet respondents seek compensation for damage resulting from just such releases of flood waters.

The court of appeals' revisionist view of Section 702c is based upon its erroneous reading of the provision's legislative history. The court of appeals correctly stated that the purpose of Section 702c was to "declare[] in

---

[15] It is not suprising that Congress took this step. The Federal Tort Claims Act exempts the United States from liability for damage related to especially hazardous activities such as "the imposition or establishment of a quarantine by the United States" and claims "arising out of * * * combatant activities * * * during time of war" (28 U.S.C. 2680(f) and (j)). Indeed, early versions of the Tort Claims Act contained an exception for "[a]ny claim arising out of the activities or work of the Government, its agents or employees, relating to flood control." H.R. 9285, 70th Cong., 1st Sess. § 8(a)(6) (1928); see also S. 4567, 72d Cong., 1st Sess. § 206(6) (1932); H.R. 17168, 71st Cong., 3d Sess. § 3(a)(6) (1931). This provision undoubtedly was removed from the proposed legislation when Congress realized that the necessary immunity was supplied by Section 702c.

advance what part of the expenses of this project the United States was to pay. That was to be what items Congress specified and nothing more" (Pet. App. 16a). The court's mistake was its decision to adopt an unjustifiably narrow view of the scope of this congressional declaration. The court stated that Section 702c replaced a provision of the Senate bill providing monetary compensation for property damaged as a result of the implementation of the flood control plan, and thus that "the disclaimer of liability must be read as a direct negation or repudiation of the provision it superseded, which would have provided munificence to those whose property was affected [by a flood control project]" (Pet. App. 17a).

In fact, the provision that became Section 702c was added to the bill on the floor of the House of Representatives; it was not a substitute for an existing provision of the Senate bill. Moreover, Section 702c was added to the bill before the House considered the compensation provision cited by the court of appeals. See 69 Cong. Rec. 7022-7023 (1928). A review of the House debate concerning the latter provision confirms that Congress did not view Section 702c in the limited manner described by the court of appeals.

The Senate bill, as reported by the House committee, did provide for generous compensation to persons whose lands were subject to flooding when waters were diverted into the flood ways. The provision granted "just compensation" for property "used, taken, damaged, or destroyed" in carrying out the flood control plan, including "all property located within the area of the spillways, flood ways, or diversion channels" (69 Cong. Rec. 7030 (1928)). Thus, the bill required the government to purchase or condemn rights of way or flowage rights for such property. In addition, it mandated compensation for "all expenditures by persons, corporations, and public-service corporations made necessary to adjust or conform their property, or to

relocate same because of the spillways, flood ways, or diversion channels" that would be constructed pursuant to the flood control plan (*ibid.*).

This compensation requirement was the subject of a great outcry on the House floor. It was viewed as providing a windfall for the railroads, because their representatives had testified that costs of over $71 million would be incurred in rearranging railway lines to avoid the flood ways and spill ways. Many congressmen expressed the view that property owners should absorb such costs because of the protection that their property would receive as a result of the flood control program. 69 Cong. Rec. 6718 (1928) (remarks of Rep. Hull); *id.* at 6712 (remarks of Rep. Kopp); *id.* at 6656, 6657, 6659 (remarks of Rep. Frear); H.R. Rep. 1072, *supra,* at 146, 224-228. The House of Representatives therefore amended the compensation provision. The bill as enacted simply required the government to purchase flowage rights over land that would be newly flooded as a result of the construction of the flood works. The provision for relocation expenses was deleted from the final bill. 69 Cong. Rec. 8121 (1928) (remarks of Rep. Frear); 33 U.S.C. 702d.

Since Section 702c did not replace the compensation provision contained in the Senate bill, the court of appeals obviously erred in interpreting Section 702c by reference to the scope of the Senate bill provision. In addition, Section 702c must have had a purpose other than prohibiting generous compensation for property owners because Congress eliminated that possiblity by deleting the offending provision of the Senate bill. Section 702c accordingly must have been designed to restate the government's sovereign immunity with respect to *all* damage related to the flood control program.[16]

---

[16] Other than its erroneous analysis of the legislative history, the court of appeals cited no evidence for its conclusion that Congress did not intend to immunize the government from all damage caused by

The court of appeals also intimated (Pet. App. 19a n.16) that Congress intended Section 702c solely as a bar to liability for property damage, and that the provision therefore might not bar respondents' claims for damages based upon personal injuries. However, the court's analysis of the legislative history again is incorrect. First, its reliance upon the proviso of Section 702c to support this conclusion is totally misplaced. The proviso was not proposed at the same time as the immunity provision of Section 702c. The proviso was introduced by a different congressman as a separate amendment to the bill, and was designed to address the specific problem of compensation for damage to riverfront land when such land could not be protected through the construction of a levee. 69 Cong. Rec. 7022, 7023 (1928) (remarks of Rep. Garrett). Since the adoption of the proviso was not tied to the immunity provision, the proviso does not supply a reliable basis for ascertaining the scope of the grant of immunity set forth in Section 702c.

Second, the court of appeals justified its limited view of Section 702c on the ground that the congressional debate related only to claims for property damage and that the terms "liability" and "damage" were used during the debate only to refer to property damage caused by the construction of the flood control projects (Pet. App. 8a, 19a n.16). However, the court of appeals cited no evidence that Congress intended to limit the scope of Section 702c

---

flood waters (see Pet. App. 18a-19a). In fact, there was good reason for Congress to reaffirm the government's sovereign immunity from all damages liability. Congress had waived sovereign immunity in a related area by enacting the Suits in Admiralty Act, and the more general waiver of sovereign immunity that became the Federal Tort Claims Act already was being considered by Congress. *Dalehite* v. *United States*, 346 U.S. 15, 24 (1953); see note 15, *supra*. Judge Gee correctly observed that "[d]riving down a clear stake in such a dangerous area might well have been seen by Congress as wise" (Pet. App. 35a n.4).

to these circumstances. The debates contain considerable discussion regarding the injuries inflicted on persons by flood waters (see pages 20-21, *supra*). Of course, even if the court of appeals were correct that the debates focused upon property damage, that fact "does not create a 'negative inference' limiting the scope of [Section 702c] to the specific problem that motivated its enactment." *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 679 (1983); see also *American Bank & Trust Co.* v. *Dallas County*, 463 U.S. 855, 867 (1983).

In sum, these "fragments of legislative history * * * regardless of how liberally they are construed, do not amount to a clearly expressed legislative intent contrary to the plain language of the statute" (*American Tobacco Co.* v. *Patterson*, 456 U.S. at 75).[17] Indeed, it is significant that the court of appeals declined to construe Section 702c in the manner dictated by its own analysis of the legislative history. The court summarized its view of the legislative history by stating that "[i]t seems doubtful that Congress intended to shield the negligent or wrongful acts of government employees—either in the construction or in the continued operation of the Mississippi [flood control] plan" (Pet. App. 18a-19a (footnote omitted)), but it held that the statute *does* immunize the government "for any fault of its employees in controlling floodgates or managing lands to contain, prevent, or manage floods or floodwaters" (*id.* at 27a-28a). The court of appeals thus

---

[17] We note in this regard that the panel of the court of appeals relied upon similar legislative history in reaching a wholly different conclusion. The panel stated that "[w]e think it clear that Congress intended to disclaim liability for 'takings' and not liability for consequential damages" (Pet. App. 55a). In view of these quite different conclusions reached by the same judges (the panel opinion also was written by Judge Reavley) on the basis of this legislative history, these statements in the debates do not appear to provide reliable guides to ascertaining Congress's intent.

recognized that Congress intended to broadly immunize the United States from liability, even when damage resulted from the negligence of government personnel.[18]

Instead of resting its decision upon the language or legislative history of Section 702c, the court of appeals simply created its own exception to the goverment's immunity from liability, holding that Section 702c applies with respect to damage resulting from the release of flood waters but "does not extend to the fault of government employees in failing to warn the public of the existence of hazards to their accepted use of government-impounded water, or nearby land" (Pet. App. 28a). Where "the presence or movement of water for flood control purposes merely furnishes a condition of the accident, there is no section 702c immunity" (*ibid.*). The court's inability to cite any authority for its imaginative construction of the statute reveals the flaw in the court's conclusion: there is no justification for this restriction of the broad immunity conferred by Congress.

To begin with, the court of appeals' distinction between the government's management of flood waters and its failure to warn of the hazards of such waters is completely artificial. Cf. *Laird* v. *Nelms*, 406 U.S. 797, 802 (1972) (holding that the plaintiff could not assert under the Federal Tort Claims Act a trespass claim that actually was a claim in strict liability because "[t]o permit [plaintiff] to proceed on a trespass theory here would be to judicially admit at the back door that which has been legislatively turned away at the front door"). Respondents' damage ob-

[18] In addition, despite its assertion that Congress did not intend to immunize the United States from liability for personal injuries (see pages 28-29, *supra*), the court of appeals' construction of the statute would immunize the United States from liability for personal injuries resulting from "any fault of its employees in controlling floodgates or managing lands to contain, prevent, or manage floods or floodwaters" (Pet. App. 27a-28a).

viously resulted from the release of flood waters from flood control projects; they would have incurred no injury if the waters had not been released (see Pet. App. 33a (Gee, J., dissenting)).

In addition, deciding whether to give a warning and the manner in which to convey a warning are determinations that are part and parcel of the management of a flood control project. Thus, it often would be possible to transform a claim based upon damage from the release of flood waters into a claim based upon failure to warn. A farmer whose cattle are swept away as the result of a release of flood waters from a flood control project could argue that his injury was caused by the government's failure to inform him that waters were to be released. Judge Gee correctly concluded that the test formulated by the court of appeals would work a considerable reduction in the government's immunity and amounts to "a classic exercise in granting with one hand and taking away with the other" (Pet. App. 33a (Gee, J., dissenting)).

Furthermore, the court of appeals' determination that the immunity should depend upon the nature of the government's conduct cannot be squared with Congress's declaration that the government is immune from liability for "any" damage "from or by" flood waters, without regard to the character of the particular flood control activity that might have caused the injury. Congress plainly concluded that, in view of the vast scope of the flood control program, the fact that the damage was caused by flood waters was a sufficient reason to bar liability. The court of appeals' decision that immunity should not be available in some circumstances even though the damage is related to flood waters "simply brushes [the statute's plain words] aside and substitutes for them the court's notions of good policy" (Pet. App. 32a (Gee, J., dissenting)). But a court may not rely upon its own assessment of the rele-

vant policies to "justify its disregard of a clear congressional directive" (*Central Trust Co.* v. *Official Creditors' Committee of Geiger Enterprises, Inc.*, 454 U.S. at 359).

It is regrettable that respondents have suffered serious losses, but that fact provides no justification for overriding the policy determination made by Congress when it enacted Section 702c. Congress recognized that floods are extremely hazardous and concluded that the federal government could shoulder the burden of protecting the public at large from this threat only if the government was assured that it would not be subject to liability for any damage caused by flood waters. Although this determination may deprive some claimants of compensation for their injuries, its principal effect has been to benefit society by making possible the large network of flood control projects that have reduced substantially the harm caused by flooding. The court of appeals erred by tampering with the balance between these competing interests that Congress struck more than a half-century ago.

C. Even If This Court Concludes That The Legislative History Of Section 702c Is Ambiguous, It Should Construe Section 702c In Accordance With Settled, Longstanding Judicial Interpretation

Prior to the decision of the court below, every court of appeals to address the question had construed Section 702c as a broad grant of immunity from tort liability for damage caused by flood waters. The court of appeals erred by rejecting this settled longstanding interpretation of the provision. It is for Congress, not the court of appeals, to adopt a new rule governing the liability of the United States in this context.

This Court several times has declined to overturn a longstanding consistent judicial interpretation of a statute even though there might be some support for a contrary conclusion regarding the meaning of the statute. For

example, in *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974), the Court construed the jurisdictional requirement of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a). The issue was whether Congress intended to apply the statute to the full extent of its commerce power—to any case in which the violation had an effect on commerce—or whether the provision was limited to cases concerning goods in the flow of interstate commerce.

The Court observed that the provision's legislative history weighed against the former theory, but went on to state that "even if the legislative history were ambiguous, the courts in nearly four decades of litigation have interpreted the statute in a manner directly contrary to an 'effects on commerce' approach. * * * In the face of this long-standing interpretation and the continued congressional silence, the legislative history does not warrant" a contrary interpretation of Section 2(a). 419 U.S. at 200-201. The Court has accorded similar weight in other cases to the courts of appeals' consistent view regarding a question of statutory interpretation. See, *e.g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 731-733 (1975); *Blau* v. *Lehman*, 368 U.S. 403, 413 (1962); *Missouri* v. *Ross*, 299 U.S. 72, 75 (1936); cf. *Flood* v. *Kuhn*, 407 U.S. 258, 282 (1972).

As we have discussed (see pages 13-14, *supra*), every court of appeals to construe Section 702c aside from the court below has held that the provision immunizes the United States from all liability for damage caused by the release of flood waters from a flood control project. See Pet. App. 21a-22a (majority opinion), *id.* at 35a-36a (Gee, J., dissenting), *id.* at 38a (Higginbotham, J., dissenting). Thus, it has been settled for over 30 years that the United States is not subject to liability for flood control activities, such as those at issue in this case, and Congress has never objected to that construction of the statute. In view of the

tremendous scope of the present-day flood control program,[19] elimination of the immunity conferred by Section 702c could result in the imposition of enormous financial liability upon the United States.

Accordingly, even if the legislative history of Section 702c could be viewed as ambiguous, the court of appeals erred by overturning the settled interpretation of the statute. As Judge Higginbotham concluded in his dissenting opinion, it is appropriate to "defer to the longstanding and unanimous construction placed on § 702c by this and other courts—a construction which has given specific and unambiguous content to the clause. The majority has not made the case for turning about at this date, regardless of any ambiguity of § 702c as an original proposition. The task of changing such a settled construction should now be left to Congress" (Pet. App. 38a).

---

[19] We have been informed that the Army Corps of Engineers administers approximately 518 flood control structures, the Bureau of Reclamation operates some 54 reservoirs that serve flood control purposes, the Soil Conservation Service administers approximately 8,592 flood control dams, and the Tennessee Valley Authority operates or manages some 35 dams that serve flood control purposes.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
ANDREW J. PINCUS
Assistant to the Solicitor General

JANUARY 1986

U.S. GOVERNMENT PRINTING OFFICE 1986—491 507/20137

RESPONDENT'S

BRIEF

Supreme Court, U.S.
FILED
FEB 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-434

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA,
Petitioner,
v.
CHARLOTTE JAMES,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,
v.
KATHY BUTLER, INDIVIDUALLY AND AS SURVIVING WIFE AND HEIR OF EDDY BUTLER,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,
v.
SUSAN B. CLARDY, INDIVIDUALLY AND AS NATURAL TUTRIX OF THE MINORS, BRIDGET MARIE CLARDY AND KENNETH CLARDY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS JAMES AND BUTLER

Of Counsel:
PETER E. SCHEER
JOSEPH N. ONEK
PAUL J. VAN DE GRAAF
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

T. JOHN WARD
(Counsel of Record)
SHARP, WARD, PRICE, HIGHTOWER & SEARCY
Post Office Drawer 3106
Longview, Texas 75606
(214) 757-2880

WILSON - EPES PRINTING

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-434

UNITED STATES OF AMERICA,
Petitioner,
v.
CHARLOTTE JAMES,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,
v.
KATHY BUTLER, INDIVIDUALLY AND AS SURVIVING WIFE AND HEIR OF EDDY BUTLER,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,
v.
SUSAN B. CLARDY, INDIVIDUALLY AND AS NATURAL TUTRIX OF THE MINORS, BRIDGET MARIE CLARDY AND KENNETH CLARDY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS JAMES AND BUTLER

INTRODUCTION

This case involves two separate suits under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 *et seq.*, consolidated for purposes of appeal to the Court of Appeals for the Fifth Circuit. The claims of Charlotte James and

Kathy Butler arise from a June 8, 1979 incident on the Millwood Reservoir in Arkansas. The claim of Susan B. Clardy arises from an unrelated May 17, 1980 incident on the Bayou Courtableu in Louisiana. This merits brief is submitted on behalf of respondents James and Butler in the first of the consolidated cases. The brief for respondent Clardy is being submitted separately.

STATEMENT

The Millwood Reservoir is a flood control project in Arkansas operated by the United States Corps of Engineers. Located in the southwestern corner of the state, it is bordered by Ashdown, Arkansas to the south, and Brownstone, Arkansas to the north. Work on the reservoir project was begun in 1961 and completed in the mid-1960's with the construction of a dam and spillway on Arkansas' Little River. The reservoir is part of the Red-Ouachita River Basin flood control project authorized by Congress in the Act of July 24, 1946, ch. 596, 60 Stat. 647. Funding for the reservoir was provided in the Act of July 3, 1958, Pub. L. No. 85-500, 72 Stat. 297, which in relevant part amended and modified the 1946 Act.

Although not required for flood control purposes, or even related to the control or prevention of flooding, the Corps of Engineers has undertaken to make the reservoir available for recreational use. Such activities include fishing, swimming, boating and water-skiing. To facilitate the use of the facility for recreational purposes, the reservoir includes marinas and various roadways for the launching of small boats. (Plaintiffs' Trial Exhibit 8). A government publication promoting the recreational features of the project invites and encourages the public to use the Millwood Reservoir for recreational activities, including water-skiing. (Pet. App. at 28a).

Discharges of water from the reservoir for flood control purposes pass through, and are regulated by, thirteen "tainter" gates in the Millwood dam. Depending on the

level of the reservoir and the volume of water being released, discharges create potentially dangerous currents near the dam. The Corps of Engineers ordinarily deploys two buoy lines on the reservoir to alert recreational users to these hazards. The buoys, bearing different colors and markings, warn boaters and others to keep a safe distance and indicate the areas of greatest danger. (Pet. App. at 29a, 40a, 68a, 69a).[1] Because discharges through the dam occur below the water line, persons on the reservoir cannot observe the fact that the tainter gates are open. (Trial Transcript at 13, 26, 29).[2] The presence of the buoys is therefore crucial to the safety of anyone using the reservoir.

On June 8, 1979 respondents Kathy Butler, her husband Eddy Butler and Charlotte James went onto the Millwood Reservoir to water-ski, together with Mrs. James' husband and their nine-year old daughter. (Tsc. at 11). The reservoir was in flood control status and water was being discharged through the dam's tainter gates at the rate of approximately 24,000 cubic feet per second. (Pet. App. at 67a). The danger-warning buoys, however, were not in their place in front of the dam structure. The steel cable linking together most of the buoys had been broken by driftwood and other debris swept toward the dam as a result of the water discharges during previous months. (Pet. App. at 69a). The responsible government personnel at the Millwood Reservoir were fully apprised of the situation, but had done nothing to reposition the buoy lines or to otherwise warn recreational users of the dangerous conditions near the dam. (Pet. App. at 2a, 3a, 41a, 69a).

Unaware of the swift currents generated by the release of flood waters, the Butler and James families be-

---

[1] A heavy steel cable linking together the longer of these two buoy lines also operates as a physical barrier, blocking boats that attempt to approach the tainter gates.

[2] References to the trial transcript are hereinafter cited as "Tsc.," followed by the relevant page.

gan water-skiing close to the dam where, on the surface at least, the reservoir waters were calmest. Their intention was to ski away from the discharge area toward the opposite side of the reservoir. (Tsc. at 19, 67). Ms. James and Ms. Butler were the first to ski, each holding a separate tow line. (*Ibid.*) As the boat started up, both skiers rose briefly behind it; Ms. James, however, fell back into the water, and Ms. Butler dropped her line so as to be near Ms. James for the next skiing attempt. (Tsc. 19, 67, 146).

There was no second attempt. Almost immediately, Ms. James and Ms. Butler began to drift toward the dam structure. (Tsc. at 20-21). Mr. Butler, who was operating the boat, circled back around to give the skiers the tow lines, intending to ease them slowly away from the dam before accelerating the boat. Because of the swift currents, however, Ms. Butler and Ms. James were unable to hold on to the lines. (Tsc. at 20-21, 166-67). Mr. Butler then directed the boat toward the skiers, making several attempts to pull them aboard by hand. Each time, however, the current pulled the skiers out of reach. (Tsc. at 21).

Finally, amid screams for help and the thundering roar of the open tainter gates (Tsc. at 21-22, 148-49), Mr. Butler dove into the water to save his wife. He was sucked through the tainter gates and killed in the rescue attempt. Ms. Butler and Ms. James, also sucked through the gates, survived the incident, although both suffered serious injuries. The boat itself became lodged in the dam structure. Mr. James and the James' daughter remained on the boat and were rescued several hours later. (Pet. App. at 68a).

The district court characterized the case as a "classroom example of a death and injuries resulting from conscious governmental indifference to the safety of the public." (Pet. App. at 66a). The court found that the government personnel not only had "actual knowledge" (Pet. App. at 69a) that the safety buoys were missing, but that

they also "knew that the dangerous condition created *would result in injury*" in the absence of some other type of warning. (*Ibid.*) (emphasis added). The court concluded that the government's failure to protect respondents "constitute[d] *willful and malicious conduct.*" (Pet. App. at 72a) (emphasis added).

The district court set the damages at $1 million for Ms. Butler's injuries and for the wrongful death of her husband, and at $40,000 for Ms. James' injuries. Nonetheless, the court entered judgment for the United States, reasoning that recovery against the government was barred by section 3 of the 1928 Flood Control Act,[3] 33 U.S.C. 702c. Section 702c reads, in relevant part, that "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." Relying on earlier cases interpreting the 1928 Act, the court concluded that this language created a flood control exception to the Tort Claims Act's waiver of sovereign immunity.

On appeal, this judgment was initially affirmed by the Court of Appeals for the Fifth Circuit. The court of appeals determined that it was bound by previous decisions that had given an expansive reading to the scope of governmental immunity under section 702c. Nonetheless, the court made clear its view that these cases had been wrongly decided. The three-judge panel stated that section 702c should be construed to permit ordinary tort claims for negligently caused damage or injury not involving "takings" of private property.

Following reconsideration of respondents' claims *en banc*, the full Court of Appeals for the Fifth Circuit reversed the judgment of the district court. Reviewing anew the legislative history of the 1928 Flood Control

---

[3] 33 U.S.C. § 702a *et seq.* The formal title of the statute is "An Act for the Control of Floods on the Mississippi River and its Tributaries, and for other Purposes." We refer to it herein as the "1928 Flood Control Act" or the "1928 Act."

Act, the court found that prior decisions interpreting section 702c had misread Congress' intent in limiting the federal government's liability for "damage from or by floods or flood waters." The *en banc* court reasoned that, consistent with the underlying purpose of section 702c, the disclaimer of liability provision was meant to immunize only those governmental activities undertaken for reasons of flood control. The government is not immune from suit, the court concluded, where the actions giving rise to injury were only incidentally related to the regulation of flood waters.

The court stated that, while section 702c immunizes the government "for any fault of its employees in controlling floodgates or managing lands to contain, prevent, or manage floods or flood waters[,]" the statutory protection "does not extend to the fault of government employees in failing to warn the public of the existence of hazards to their accepted use of government-impounded water, or nearby land." (Pet. App. at 27a, 28a). The court concluded (Pet. App. at 28a):

> If a producing cause of the damage or injury is a government employee's negligence in omissions or commissions that diverge from acts strictly for the purpose of controlling floods or floodwaters, and the presence or movements of water for flood control purposes merely furnishes a condition of the accident, there is no section 702c immunity.

SUMMARY OF ARGUMENT

The central issue in this case is the permissible scope of the immunity afforded the federal government by a disclaimer of liability clause contained in section 3 of the Flood Control Act of 1928, 33 U.S.C. § 702c. A close analysis of the legislative history of that section, its interrelationship with other provisions in the same 1928 statute, and its effect on subsequent flood control legislation, reveals a number of limiting principles that circumscribe section 702c's immunity in significant ways.

The arguments advanced in this brief, based on these limiting principles, differ from the interpretation of section 702c given by many of the lower federal courts; they also differ in certain respects from the analysis applied by the court of appeals below. Respondents' divergent approach is necessary to clarify the extent of immunity to which the government is entitled for flood control activities. We submit that, seen in its proper context, section 702c has no bearing on respondents' claims under the Tort Claims Act.

I. The Solicitor General is correct in characterizing section 702c as an effort by Congress to demarcate the government's liability for damages resulting from flood works undertaken pursuant to the 1928 Flood Control Act. The problem is that he draws the line in the wrong place. The Solicitor contends that section 702c is nothing more than a codification of the federal government's sovereign immunity. As such, the provision had absolutely no meaning or effect when enacted, since the government's immunity from tort claims was unquestioned in 1928. This interpretation, turning traditional rules of statutory construction on their head, simply misses the point of section 702c. Congress was not the least bit concerned about liability for accidental damage caused by governmental negligence or other tortious conduct. Instead, Congress was concerned about the foreseeable and anticipated impact on private property of the massive flood control projects contemplated by the 1928 Act.

One of the most divisive issues confronting Congress in its deliberations over the 1928 legislation focused on the nature and amount of property rights in the Lower Mississippi River Valley that the government would acquire in connection with the flood control plan. On one extreme of this debate was section 4 of the Senate bill, S. 3740, 70th Cong., 1st Sess., 69 Cong. Rec. 5483 (1928), promising open-ended compensation to a variety of parties, including railroads, for all manner of damages or costs incurred to adjust to the government's flood control

projects. On the other extreme was a proposal, backed by the Coolidge administration, that would have confined the government's obligations in this regard to the requirements of the Fifth Amendment "takings" clause.

Section 702c was part of a package of amendments to the Senate bill, adopted by the House and modified only slightly in conference, to effect a compromise between these two alternatives in a manner acceptable to the administration. In lieu of the overly generous compensation provision of the senate bill, Congress inserted the *proviso* to section 702c, committing the government to purchase interests in certain properties bordering the main channel of the Mississippi River; and section 702d, committing the government to purchase "flowage rights" to certain properties located in or near proposed diversions from the river.

Although these amendments cut back on the largess of section 4 of the Senate bill, the government's financial responsibilities remained potentially great. Congress plainly intended section 702d and the section 702c *proviso* to provide remedies in excess of constitutional requirements, but Congress did not want to write a blank check for the purchase of flowage rights and other property interests under those two sections. In this context the immunity provision of section 702c was added to provide the government a measure of control over the magnitude of its financial commitment. Section 702c operates to bar claims against the government under section 702d and the section 702c *proviso* for damages to property that do not rise to the level of a constitutional taking. That is its only purpose. Section 702c renders the government-initiated condemnation proceedings prescribed in section 702d the exclusive mechanism for payments to property owners, thus assuring that the compensation clauses of section 702d and section 702c will not be transformed into judicially enforceable entitlements.

II. Even if section 702c can be read as prohibiting ordinary tort claims for negligently caused damages or

injury, it has no applicability on the facts of this case because respondents' claims arise from the government's mismanagement of *recreational* activities on the Millwood Reservoir—activities having nothing to do with flood control. It is a fundamental principle of immunity doctrine that the sphere of protected activity must be narrowly limited by the purpose for which the immunity was granted. The government does not even suggest that recreational activities were contemplated by Congress when it enacted section 702c.

The limited reach of section 702c derives from its function as a *quid pro quo* in the 1928 Act. Under pressure from states directly affected by the proposed flood control projects, Congress agreed to place on the federal government virtually the entire burden for the construction of the flood works and the purchase of necessary property rights. In exchange, local interests agreed to forfeit any claims that they might have against the United States in the event the protective measures failed. Application of section 702c in this case would breach the bargain struck by Congress. Respondents impliedly assumed the risk of losses occasioned by the government's mishandling of flood control activities; however, they did *not* assume any comparable risk with respect to losses caused by recreational activities or other conduct neither related nor necessary to flood control.

The government's analysis of Section 702c simply ignores the recreational context in which respondents' death and injuries occurred. Stressing the fact that the accident coincided with the discharge of flood waters from a flood control reservoir, the Solicitor General's theory appears to be that section 702c stands as a complete bar to recovery whenever flood control activities are a "but for" cause of a plaintiff's harm. But such an expansive construction of section 702c leads to absurd results, transforming an immunity created for one type of activity into blanket protection for fundamentally different activities, far afield from Congress' original purposes.

The relevant inquiry, we submit, is not whether flood control activities constitute a "but for" cause of a plaintiff's damages, but whether the damages would have occurred in the absence of government negligence (or worse) with respect to an activity wholly unrelated to flood control. This is a purely legal question that does not require a court to assess the relative significance of flood control and nonflood control activities as causative agents in the events leading to a plaintiff's harm. Nor would this approach significantly expand the government's liability for damages. Flood control activities have been the exclusive cause of damage in virtually every court of appeals decision where the government has successfully invoked section 702c.

III. Section 702c has no relevance in this case for the separate reason that that provision, like other aspects of the 1928 Flood Control Act, applies only to flood control projects in the Lower Mississippi River Valley authorized by that Act or subsequent legislation expresaly amending it. The Millwood Reservoir, where respondents' death and injuries occurred, was authorized by flood control statutes enacted in 1946 and 1958 that are both silent on the question of immunity from damages. Moreover, the reservoir is part of the Red-Ouachita River Basin project, which is geographically and legally distinct from the Lower Mississippi River Valley project created by the 1928 legislation.

Section 702c can be said to bar respondents' claims only if the immunity provision applies *sub silentio* to every flood control project in the country, wherever located and whenever and however authorized by Congress. This is the position of the Solicitor General, and several lower federal courts have so held. This theory of universal applicability, however, is based on nothing more than a perceived national "policy" in favor of immunity for all flood control activities. It is a policy that has never been adopted by Congress; nor can it be squared

with the history of flood control legislation subsequent to 1928.

Congress knows how to carry forward a provision from one flood control statute to another, and has done so explicitly and repeatedly with respect to the 1928 Act. Later statutes expressly amending and modifying the 1928 statute make clear that section 702c applies only to flood works in the Lower Mississippi River Valley project. This geographical limitation is confirmed by the fact that other post-1928 statutes, not expressly amending the 1928 Act, contain substantive provisions that are flatly inconsistent with the terms of that Act. Indeed, one post-1928 statute contains its own immunity provision that confers on the government a lesser degree of protection than section 702c. Obviously, Congress could not at the same time have incorporated section 702c *sub silentio* into this later statute and prescribed a separate immunity provision narrower in scope than section 702c.

These arguments apply with special force to the Millwood Reservoir because the 1946 statute authorizing that project was passed by the same Congress that enacted the Tort Claims Act. Congress' attention was thus clearly focused on the question of the government's amenability to suit. In view of the fact that other post-1928 flood control laws contain their own express immunity provisions, Congress' silence in the 1946 Act on the question of damages compels the conclusion that it did not intend section 702c to apply to flood control projects authorized in that statute.

IV. There is no merit to the government's suggestion that Congress has impliedly acquiesced in lower federal court decisions construing section 702c as a bar to ordinary tort claims. For one thing, the lengthy history of litigation under section 702c has never presented Congress with a definitive ruling, much less a consistent pattern of judicial decisions, on the type of personal injury claim presented here. For another, the lower courts have

not spoken with a single voice in their construction of section 702c. On a number of issues, including the relevance of the governmental purpose underlying specific harm-producing activities, the lower courts are in disagreement. Under these circumstances, nothing can be inferred either way from the fact that Congress has not felt compelled to amend section 702c. There is no consistent or long-standing interpretation of that provision, dispositive of respondents' claims, which Congress can be fairly said to have endorsed.

ARGUMENT

I. SECTION 702c WAS INTENDED NOT TO IMMUNIZE THE GOVERNMENT AGAINST TORT CLAIMS FROM WHICH IT ALREADY WAS IMMUNE, BUT TO DEAL WITH A SPECIAL PROBLEM CREATED BY CONGRESS' DECISION TO COMPENSATE CERTAIN PROPERTY OWNERS FOR FLOOD DAMAGES.

At issue in this case is the interpretation of the words "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place" contained in section 3 of the 1928 Flood Control Act, 33 U.S.C. § 702c. Despite the seeming breadth of this disclaimer, Congress was not the least bit concerned with accidental injuries caused by mismanagement of flood control projects. Rather, its focus was on the foreseeable and anticipated impact of authorized flood control activities on private property in the Lower Mississippi River basin. As we show, section 702c must be seen as part of a statutory scheme designed to provide relief to certain landowners, while at the same time enabling the government to maintain control over the magnitude of its financial commitment. That is the section's *only* purpose.

Our interpretation of section 702c begins with two propositions. The first is that analysis of congressional intent with respect to section 702c cannot be shortcircuited by resort to the "plain meaning" of the statutory language. *See Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 104 S. Ct. 2105, 2110 (1984). The meaning of the provision is hardly "plain" as applied to the facts in this case. Respondents' death and injuries occurred on a flood control reservoir at a time when waters from the reservoir were being released by government employees. On its face, however, section 702c appears to be addressed to the damages caused by actual floods or the downstream injury or damage caused by the discharge of flood waters. Although we do not argue that the provision must be interpreted in this way, it is an interpretation that fits more comfortably into the bare words of section 702c than the far broader reading urged by the government.

Moreover, it is undisputed that section 702c is not to be applied literally. For example, section 702c does not render noncompensable flood damage from a federal project causing a "taking" of private property within the meaning of the Fifth Amendment. This Court on several occasions has assumed that the 1928 Flood Control Act does not effect a withdrawal of federal court jurisdiction for takings claims under the Tucker Act, 28 U.S.C. § 1491 *et seq. See General Box Co. v. United States*, 351 U.S. 159 (1956); *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799 (1950). And, absent an unequivocal expression of congressional intent to do so, no such withdrawal of jurisdiction may be implied or inferred. See *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2882-83 (1984); *Blanchette v. Connecticut General Insurance Corp.*, 419 U.S. 102 (1974). *Cf. Agins v. City of Tiburon*, 447 U.S. 255 (1980).[4]

Similarly, several provisions of the 1928 Act provide for the payment of compensation to property owners for certain types of damages caused by floods or flood control

[4] The government here concedes that § 702c, despite the breadth of the statutory language, does not purport to disclaim liability for constitutional takings.

projects—damages falling within the literal prohibition of section 702c. Thus, section 702d commits the government under certain circumstances to acquire "flowage rights" to property in floodways, flood channels, or other "diversions from the main channel of the Mississippi River" that are subject to flood damage as a result of the 1928 legislation. Also, the *proviso* to section 702c commits the federal government to acquire rights or title to certain properties bordering the Mississippi River that are "subjected to overflow and damage" as a result of the construction of levees on the river's opposite bank. These related provisions are crucial to understanding Congress' intent with respect to section 702c, and are discussed at length below. We mention them briefly here simply to demonstrate that section 702c's immunity provision, contradicted by other terms of the same statute, is hardly free of ambiguity.

Our second proposition is that any interpretation of section 702c must begin with a *presumption* that it was not intended to immunize the federal government from liability predicated on the negligence or other tortious actions of government employees. This is so for the simple reason that in 1928, when the flood control legislation was enacted, the federal government already enjoyed complete immunity from such claims under the doctrine of sovereign immunity. *See, e.g., Kansas v. United States*, 204 U.S. 331 (1907); *Cunningham v. Macon & Bros. Railway Co.*, 109 U.S. 446 (1883); *United States v. Lee*, 106 U.S. 196 (1882). The government did not give its consent to ordinary tort suits of this kind until passage of the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 *et seq.*, in 1946, nearly twenty years later. Moreover, as discussed below, the legislative history of the 1928 Act makes clear that Congress was well aware of the scope of protection afforded by sovereign immunity when section 702c was enacted.

If Congress meant merely to codify the doctrine of sovereign immunity—the position urged by the Solicitor

General—it follows that section 702c was absolutely meaningless when it was passed. This approach to the 1928 Act flies in the face of traditional rules of statutory interpretation. A key provision of a federal statute should not be construed as mere surplusage, such that the statute has precisely the same meaning and effect without the contested provision as with it. *See, e.g., Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 105 S. Ct. 2587, 2595 (1985); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39 (1979); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). This is particularly true where, as here, the provision in question was adopted by Congress as part of a package of amendments that were viewed as essential to meet the objections of the Executive Branch and to avoid a possible Presidential veto of one of the most important legislative undertakings of the day. See pages 20-23, *infra*.

Reduced to its essentials, the Solicitor General's analysis of section 702c is predicated on the following argument: the immunity provision of the 1928 act was completely superfluous when enacted, constituting nothing more than a legislative affirmation of the government's sovereign immunity from tort suits; the provision, however, sprang to life upon passage of the Tort Claims Act, carving out a special flood control exception to that Act's general waiver of immunity. The fundamental flaw in this approach, shared by most lower federal courts that have examined section 702c, is its failure to adequately answer the question: Why would Congress provide statutorily for a protection that the federal government already possessed?

The answer is that codification of sovereign immunity is simply not what Congress had in mind. Close analysis of the legislative history of the 1928 Act, as well as the interrelationship of section 702c with other provisions of the statute, reveals that Congress' focus was on a special problem created by its own largess in agreeing to provide compensation for certain types of property

damages. As we show, Congress made the conscious decision to purchase rights in private property that it believed the government was *not* required to purchase under then-controlling precedents regarding constitutional takings. Section 702c, together with other provisions of the statute, was included to give the government control over the scope of this financial commitment.

That was section 702c's only purpose: not to immunize the government against suits from which it was immune in any event, but, in the face of grave concerns about the potentially massive cost of the overall flood control program, to provide the government a measure of control over the financial burden it elected to undertake.

Background and Legislative History

The 1928 Act was not the first time Congress had enacted legislation to deal with the recurrent problem of flooding in the alluvial valley of the Mississippi River. In conjunction with states and local governments, Congress undertook a series of flood control projects beginning in the nineteenth century. *See United States v. Sponenbarger*, 308 U.S. 256, 261 (1939). Under what became known as the "Eads Plan," these projects were designed to protect property bordering the river by confining flood waters within its banks. To this end, a vast network of levees was built on both sides of the river for a distance of approximately 1,000 miles, from Cape Girardeau, Missouri, to the Gulf of Mexico. *See Jackson v. United States*, 230 U.S. 1 (1913). In addition, virtually every natural outlet from the river was closed. H.R. Rep. No. 1072, 70th Cong., 1st Sess. 5 (1928).

The impetus for the 1928 legislation was a disastrous flood in the Lower Mississippi River Valley during the previous year. Comprehensive engineering studies concluded that the "levees-only" strategy of the Eads Plan was not only inadequate, but had exacerbated the damage caused by the flood. *Id.* at 7. In a report submitted by

General Edgar Jadwin, Chief of Engineers of the Army Corps of Engineers, Congress was urged to pursue a new strategy of relieving pressure on the main channel of the river through the creation of diversions. S. Rep. No. 619, 70th Cong., 1st Sess. 15-20 (1928). General Jadwin's report explained that the use of diversions or "floodways" would be more effective (and less costly) than the alternatives of raising the height of the existing levees or containing flood waters in a system of reservoirs. For the most part, the engineering features of the "Jadwin Plan" were incorporated into the 1928 Act. *United States v. Sponenbarger, supra*, 308 U.S. at 261-62.

The debates in Congress on the flood control legislation focused on two major issues. The first was the allocation of costs for the project between the federal government and the states in the Mississippi River valley. While the Jadwin Plan, supported by the Coolidge administration, proposed that states and local interests share in the construction costs and bear full responsibility for the purchase of any property rights necessary for the project, S. Rep. No. 619, *supra*, at 13, 17-18, congressmen from the affected states argued that flood control was a national function and that the federal government should bear the full burden. *See, e.g.*, 69 Cong. Rec. 6666 (1928) (remarks of Congressman Cox); 69 Cong. Rec. 6667 (1928) (remarks of Congressman Denison). The latter view prevailed. Section 702b of the 1928 Act pays lip service to the principle of "local contribution," but provides that states will pay none of the anticipated construction and engineering costs. The Act also requires that, with one minor exception,[8] all lands, easements, rights of way and other property interests

[8] Under § 702c(c), the local governments' only obligation in this regard is to provide rights of way "for levee foundations and levees" on the main channel of the river.

will be acquired by the federal government and then turned over to the states. 33 U.S.C. §§ 702c, 702d.

Once it was decided that the federal government would shoulder virtually the entire cost for the flood control project, the next issue confronting the Congress—and the central one for present purposes—concerned the parameters of this financial obligation. As indicated, the government was committed to underwriting all construction costs. Thus, the specific concern here focused on the type of property rights that the government would acquire, the amount of such rights that would be purchased, and the mechanism to be used to obtain them. These questions were of overriding importance because of their potential fiscal impact. While the government's cost for the actual construction of the project was projected at approximately $300 million, S. Rep. No. 619, *supra*, at 18, estimates that included the cost of property rights ranged as high as $1 billion or more, H.R. Rep. No. 1100, 70th Cong., 1st Sess. 16-19 (1928); 69 Cong. Rec. 6999 (1928) (remarks of Congressman Frear).

In approaching these questions, Congress proceeded from the assumption that, even in the absence of legislation on the question, the Treasury would not be saddled with liability for tort claims based on negligence in the design, construction or management of flood control projects. Thus, in the Jadwin Plan, submitted to Congress by President Coolidge on December 8, 1927, the discussion of damages begins with the statement: "[I]t is a fundamental principle that no damages lie against either Federal or State Government, or local agencies, on account of an accidental crevasse" in levees or other flood control structures. S. Rep. No. 619, *supra*, at 19. The "damages" contemplated in the Jadwin Plan, for which the states and local governments would have been responsible, were damages occasioned by the taking of private property within the meaning of the Fifth Amendment. *Ibid.* Similarly, in testimony before the Senate

Commerce Committee, one key witness, discussing the Jadwin Plan's provision regarding damages, stated:

> Let me remove any misconception as to what is meant by the term "damages." [The Jadwin Plan is] not speaking of damages in the sense of those consequential damages that may result from a break of a levee in the future which may overflow some places. It is settled by the jurisprudence of the United States Supreme Court that neither the Federal Government nor the State is responsible for damages resulting from a break in a dam or levee. The damage that is spoken of in the proposal is the damage in the taking. . . . It is the constitutional protection against the taking of property without just compensation which is involved, not . . . damage in the future resulting from the failure of the protective works.

Hearings on S. 3740 Before the Senate Comm. on Commerce, 70th Cong., 1st Sess., vol. 1, at 73-74 (1928). Thus, long before the insertion of section 702c in the Flood Control Act, Congress was fully aware that the government was shielded by sovereign immunity from ordinary tort suits.

In its deliberations over the magnitude of the government's financial commitment with respect to property rights, Congress initially considered two options. One was to commit the federal government to acquire no more property than it had to acquire under the Constitution. This was the position of the Coolidge administration, as expressed originally in the Jadwin Plan. This option, however, was resoundingly rejected. It was rejected first by the Senate; it was rejected again when renewed in the House by Congressman Tilson, the House Republican leader. It was rejected a third time when revived by Congressman Frear at the close of the House debates. *See* 69 Cong. Rec. 7122 (1928). Congressman Tilson's amendment, drafted by the Attorney General, *id.* at 7108 (remarks of Congressmen Frear, Tilson and Dempsey), provided that "[a]ny property taken by the United States for the purpose of carrying out the terms

of this act for which compensation is required by the Constitution of the United States shall be paid for by the United States." *Id.* at 7104.

The second option that Congress considered was the compensation provision set forth in section 4 of the Senate bill.[6] That provision, S. 3740, 70th Cong., 1st Sess. 54, 69 Cong. Rec. 5483 (1928), stated as follows:

> Just compensation shall be paid by the United States for all property used, taken, damaged, or destroyed in carrying out the flood control plan provided for herein, including all property located within the area of the spillways, flood ways, or diversion channels herein provided, and all rights of way thereover, and the flowage rights thereon and also including all expenditures by persons, corporations, and public service corporations made necessary to adjust or conform their property, or to relocate same because of the spillways, flood ways, or diversion channels herein provided.

Objections to the Senate bill, when reported to the House by the House Flood Control Committee, focused mainly on this provision. Several congressmen, raising the specter of a Presidential veto, 69 Cong. Rec. 7000 (1928) (remarks of Congressman Frear),[7] criticized the proposal as overly generous. Congressman Kopp characterized section 4 as a windfall for the railroads, stating: "Who the author was . . . I do not know, but I feel very certain that it originated in some railroad office . . . [I]f left in the bill it will make the railroads a present

[6] As finally enacted, the 1928 flood control statute is the Senate bill, S. 3740, as amended significantly in the House, and as again amended in minor ways in Conference. As discussed in text, pages 21-23, *infra*, virtually all the relevant House amendments to the Senate bill, including § 702c, were adopted during debates on the House floor.

[7] Contemporaneous news accounts reported that President Coolidge made clear his intent to veto the bill over § 4, which he described as the "most extortionate proposal that has ever been made upon the nation's revenues." *See* N.Y. Times, Apr. 18, 1928, at 1.

of many millions of dollars . . . ." *Id.* at 6712. Others argued that, if not modified in significant ways, it would unleash a flood of damages claims against the government. *See, e.g., id.* at 6641 (remarks of Congressman Snell) ("I for one do not want to open up a situation that will cause thousands of lawsuits for damages against the Federal Government in the next 10, 20, or 50 years"); *id.* at 6656 (remarks of Congressman Frear) ("over 7,000 [lawsuits] are invited by the terms of the bill"); *id.* at 6712 (remarks of Congressman Kopp) ("the retention of section 4 as it now reads will mean a vast amount of litigation and ultimately great loss to the Government").

In the face of these objections, and in an effort to achieve a compromise acceptable to the administration, the House deleted the compensation provision in section 4 of the Senate bill and replaced it with a series of amendments, including the disclaimer of liability provision in section 702c.[8] These amendments, modified slightly in Conference, were incorporated into sections 3 and 4 of the flood control legislation as finally enacted, 33 U.S.C. §§ 702c, 702d.

[8] The Solicitor General is incorrect in stating that the House's adoption of § 702c was unrelated to the compensation provision in § 4 of the Senate bill. While technically the immunity provision was inserted in § 3 of the bill, it was taken up by the House, together with other amendments enacted as part of §§ 702c and 702d, to meet objections to § 4 of the Senate bill. See 69 Cong. Rec. 7000-01, 7022-24 (1928). The immunity provision and the § 702c *proviso* were introduced on the House floor on April 23, 1928 and the § 702d provision was introduced the following day. *Id.* at 7022 (immunity provision and § 702c *proviso*); *id.* at 7104 (§ 702d "flowage" rights provision). On April 23 Congressman Reid, chairman of the House Flood Control Committee, prefaced his remarks by stating "[w]e are going to move to strike out the section with respect to the railroads, which is § 4. Everybody has agreed to this." *Id.* at 7001. He further stated that the amendments he would offer had been drafted following deliberations with "the representatives of the President" regarding the administration's objections to § 4. *Id.* at 7000. There is no question but that the referenced amendments included § 702c, which Congressman Reid introduced the same day.

In lieu of the expansive compensation language in the Senate bill, the House identified two discrete categories of property whose owners would be compensated by the government. One consisted of property bordering the Mississippi River that would be subject to flood damage as a result of levees constructed on the opposite side. The *proviso* to section 702c, offered as an amendment by Congressman Garrett, deals with this category by providing that, where such damage could not be avoided by constructing additional levees, the government would "acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands." [9]

The second category consisted of lands located in or near diversions from the main channel of the river that would be constructed pursuant to the Jadwin Plan. An amendment offered by Congressman Reid, Chairman of the House Flood Control Committee, proposed to compensate these landowners by the purchase of so-called "flowage rights" over their property. As enacted in section 702d, this provision states: "The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River . . . ." [10]

Another related change adopted by the House and incorporated in the final version of the 1928 Act pertained

[9] The government is also incorrect in asserting that the *proviso* to § 702c was not considered simultaneously with the immunity provision of § 702c. On the contrary, the *proviso* was offered by Congressman Garrett as an *amendment* to the immunity provision which, as indicated, was itself offered as an amendment by Congressman Reid. *See* 69 Cong. Rec. 7022 (1928).

[10] The amendment, as originally offered and as passed by the House, stated: "The United States shall provide flowage rights for destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River, and shall control, confine, and regulate such diversions." 69 Cong. Rec. 7104 (1928). The House-Senate conferees added the word "additional" and deleted the last clause. *Id.* at 8119.

to the statutory mechanism by which payment of damages for these two classes of property would be made. Section 4 of the original Senate bill, in addition to its broad compensation provision, stated that the Secretary of War would institute condemnation proceedings to acquire any "lands, easements, or rights of way needed in carrying out this project." 69 Cong. Rec. 5483 (1928). The House modified this provision to clarify that the government would have discretion in determining which flowage rights and other property interests to acquire." [11] *See* page 27 & note 14, *infra*.

Finally, the House adopted the disclaimer of liability provision in section 702c, offered by Congressman Reid, as one of the components in the package of amendments calculated to meet the objections to the Senate bill in a manner acceptable to the administration. 69 Cong. Rec. 7022 (1928). There can be little doubt that it was a crucial part of the package. When the conferees later considered deleting the immunity provision, President Coolidge renewed his threat to veto the bill. *See* N.Y. Times, May 8, 1928, at 1.

Discussion

The legislative history makes clear that section 702c cannot be construed as a mere affirmation of the doctrine of sovereign immunity. Viewed in the context of the series of House amendments of which it was a part, section 702c was an essential feature of Congress' effort to cabin the fiscal impact of the commitment to purchase flowage rights and other property interests set forth in section 702d and the *proviso* to section 702c. By dis-

[11] This clarification, made by the House Flood Control Committee, was accomplished by insertion of the words "in the opinion of" in the Senate bill. H.R. Rep. No. 1100, *supra*, at 6. As enacted in § 702d, the provision reads: "The Secretary of the Army may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which, *in the opinion of the Secretary of the Army and the Chief of Engineers*, are needed in carrying out this project . . . ." (emphasis added).

claiming liability for any "damage from or by floods or flood waters at any place," Congress intended to bar claims under these two compensation provisions, thus rendering the government-initiated condemnation proceedings prescribed in section 702d the *exclusive* mechanism for the payment of damages.

The flowage rights provision of section 702d and the *proviso* to section 702c, while cutting back substantially on section 4 of the original Senate bill, did not limit the government's financial commitment to the payment of only those damages required by the takings clause of the Fifth Amendment. If that had been the purpose of those two compensation provisions, then the Solicitor General's interpretation of section 702c would be essentially correct: because Congress manifestly did not intend to disclaim liability for "true" takings, there would remain no liabilities, potential or otherwise, for section 702c to disclaim. It would follow that, as the government urges, section 702c was a superfluous appendage to the flood control statute, having no meaning at all at the time of its enactment.

But it is clear beyond question that the compensation provisions of the 1928 Act were designed to provide relief to landowners in circumstances where the Constitution afforded none. This is established, first, by Congress' rejection of the administration alternative, submitted by Congressman Tilson, that would have simply codified the constitutional standard. This amendment was introduced and considered simultaneously on the House floor with the amendment that was subsequently enacted as the compensation clause of section 702d. 69 Cong. Rec. 7104-11 (1928). It was rejected again when renewed by Congressman Frear in a last-minute motion to recommit the bill to the House Flood Control Committee. *Id.* at 7122. Obviously, had Congress intended the federal government's obligations in this regard to be coextensive with Fifth Amendment requirements, it would have either adopted the administration proposal or said nothing at all about compensation.

Moreover, the *proviso* to section 702c was specifically tailored to make available compensation for flood damages that were thought to be noncompensable under the Fifth Amendment, as this Court itself suggested in *United States v. Sponenbarger, supra*, 308 U.S. at 270 & n.19. In two early takings cases involving flood waters, *Jackson v. United States*, 230 U.S. 1 (1913), and *Hughes v. United States*, 230 U.S. 24 (1913), damages to property bordering on the Mississippi River, caused by the elevation of flood waters resulting from the federal government's construction of levees, were held to fall outside the protection of the Constitution's takings clause. By its express terms, the *proviso* legislatively reverses what Congress perceived to be the harsh result of these constitutional decisions.

The same is true with respect to the flowage rights provision of section 702d. The congressional debate on this section consisted in large part of a discussion of Supreme Court takings cases, with the amendment's advocates arguing that constitutional remedies were simply inadequate for owners of property located in the proposed floodways. Congressman Cox stated that, in the absence of the amendment, there is no "obligation on the government to make compensation" if the government "turns water into these floodways and floods land which has not been heretofore subject to the waters." 69 Cong. Rec. 7106 (1928).

Congressman Cox cited, *inter alia*, *Bedford v. United States*, 192 U.S. 217 (1904), and *United States v. Lynath*, 188 U.S. 445 (1903), and characterized the decisions as precluding "just compensation" under the Fifth Amendment except in extreme cases where flood works result in the permanent and total destruction of property. 69 Cong. Rec. 7106 (1928). He described the scope of the Constitutional protection this way (*ibid.*):

> The Government may come in and turn all of these waters into these floodways, which will result in damage to the owner of the property, and yet because

> the lands are not perpetually flooded and therefore their value not totally destroyed, there is no taking on the part of the Government within the meaning of the fifth amendment.

Although one congressman disputed this interpretation of the applicable constitutional standard, *id.* at 7109-11 (remarks of Congressman LaGuardia), he agreed that the flowage rights amendment would "broaden[] the scope" of the Fifth Amendment safeguard, *id.* at 7110, and he opposed it for that reason.[12] Thus, Congress' clear understanding was that the flowage rights provision of section 702d and the *proviso* to section 702c were a "liberal concession," *id.* at 7107 (remarks of Congressman Cox), intended to provide relief to certain landowners in cases where the Constitution would not.[13]

---

[12] Of course, the point here is not whether Congress was *correct* in its interpretation of Supreme Court takings decisions, but that it believed and understood that it was committing the government to provide compensation in excess of constitutional requirements.

[13] The remark of Congressman Spearing, relied on by the Solicitor General, must be seen in this light. Congressman Spearing stated that "[w]hile it is wise to insert [the immunity provision of § 702c] in the bill, it is not necessary because the Supreme Court of the United States has decided, as you have heard reiterated many times during the discussion of this bill, that the Government is not liable for any of these damages." 69 Cong. Rec. 7028 (1928). The authorities to which he was referring, however, were the constitutional takings cases cited by Congressman Cox, which had also been discussed in the House in connection with § 4 of the original Senate bill. *See, e.g., id.* at 6720. Thus, the "damages" that concerned Congressman Spearing were not accidental injuries resulting from governmental negligence, but the foreseeable and intended impact on private property resulting from flood control projects. This is further clarified from the context in which the remark was made. Congressman Spearing was speaking against an amendment (ultimately defeated) that would have required New Orleans, because of its "paramount interest" in a major spillway to be built near the city, *id.* at 7027, to assume responsibility for certain damages. However, the damages contemplated were in the nature of anticipated damage to property located in the path of the proposed spillway. Congressman Spearing stated: "In that area . . . are three major railroads as well as other interests and property which will be damaged. Necessarily there will be damage to those railroads and other interests in property . . . ." *Id.* at 7028.

The immunity provision of section 702c, disclaiming any liability for "damages from or by floods or flood waters at any place," was adopted together with these amendments to enable the government to limit this congressional largess. While Congress was unwilling to confine property owners to their constitutional remedies, it was also unwilling to write a blank check for the purchase of land and floodage rights under the section 702c *proviso*, or flowage rights under section 702d. Those provisions had narrowed the compensation scheme of the original Senate bill, but the government's liability remained open-ended and potentially great. Moreover, those compensation provisions, standing alone, did not address the objection that the flood control legislation would trigger endless litigation against the federal government. *See* page 21, *supra*.

The disclaimer clause in section 702c responded to these concerns by assuring that the government, and only the government, would determine how much of these property rights to acquire, and when to acquire them. As discussed earlier, the House, when adopting section 702c, also modified the second paragraph of section 702d to emphasize the government's discretion in determining which property rights to purchase. *See* page 23, *supra*. The import of this amendment, as explained in the report of the Conference Committee, is that "the opinion of the Secretary of War is to decide what lands, easements, or rights of way are necessary to be acquired." 69 Cong. Rec. 8120 (1928).[14]

---

[14] *See generally United States v. Gideon Anderson Co.*, 16 F. Supp. 627, 628 (E.D. Mo. 1936) ("[T]he decision of the Secretary of War to institute this [section 702d condemnation] proceeding was a matter for that officer to determine . . . . The statute having given the Secretary of War the discretion to act, he alone is to determine whether the necessity therefor exists . . . .").

The purpose and effect of section 702c, then, is to preclude actions against the federal government under section 702d and the *proviso* to section 702c where the alleged damages do not rise to the level of a constitutional taking.[15] For damages of that type, the government-initiated condemnation proceedings created by section 702d would be exclusive.[16] Congress undertook to make a financial commitment in the compensation provisions of the 1928 Act—a declaration of purpose to give some relief to persons having no remedy under the Constitution. Because of uncertainties concerning the potential cost of that commitment, however, section 702c was included to assure that it would not be transformed into a judicially-enforceable entitlement. Congress intended that, except in cases involving true takings, the decision would lie with the federal government—*not* private plaintiffs, and *not* the courts—as to how much property rights to acquire, when to acquire them and, within limits, how much to pay.[17]

---

[15] This, in essence, is the question that the Court declined to reach in *United States v. Sponenbarger, supra*, 308 U.S. at 270. After determining that the flood control damages in that case did not entitle the respondent to "just compensation" under the Fifth Amendment, the Court stated: "We need not here determine whether the provisions of the 1928 Act would themselves grant a statutory right to recover if respondent's land had been damaged as a result of levees constructed on the river's opposite bank." *Ibid.*

[16] *See generally Oyster Shell Products Corp. v. United States*, 197 F.2d 1022, 1023 (5th Cir. 1952) (in condemnation action by government under § 702d, defendant could not assert counterclaim for alleged damage to properties not covered by government's complaint).

[17] Section 702d as originally enacted provided that in condemnation proceedings brought by the government under that provision, "the court, for the purpose of ascertaining the value of the property and assessing the compensation to be paid, shall appoint three commissioners, whose award, when confirmed by the court, *shall be final.*" (emphasis added). This special procedure was included to protect the government against the risk that local juries would award damages far exceeding the market value of the property rights involved. *See, e.g.*, 69 Cong. Rec. 6659 (1928) (remarks of Congressman Frear); *id.* at 6717 (remarks of Congressman Swing). Early decisions construing this provision emphasized that the federal district courts were to defer to the expertise of the appointed commissioners in government-initiated condemnation cases under § 702d. *See, e.g., Guste v. United States*, 55 F.2d 115 (5th Cir. 1932).

The Solicitor General's argument for a more expansive reading of the section 702c immunity provision ignores this legislative history plainly linking section 702c to this particular congressional concern. In contending that Congress meant merely to restate sovereign immunity doctrine, the government relies on a questionable inference from the legislative history of the Tort Claims Act, passed 18 years *after* the 1928 Flood Control Act. The Solicitor General points to the fact that early versions of the Tort Claims Act, including two bills introduced in Congress in the 1930s, S. 4567, 72d Cong., 1st Sess. § 206(6) (1932); H.R. 17,168, 71st Cong., 2d Sess. § 3(a)(6) (1931), contained an exception for negligent torts committed by federal employees in connection with flood control activities. The government argues that "[t]his provision undoubtedly was removed from the proposed legislation when Congress realized that the necessary immunity was supplied by section 702c." But the reverse inference is just as plausible: Congress was aware of section 702c and rejected the proposed exception, not because it believed that section 702c already prescribed the requisite immunity, but because Congress decided that it did not wish to create a flood control exception to the Tort Claims Act.[18]

---

[18] The Solicitor General also speculates that Congress might have been concerned about the limited waiver of sovereign immunity in the Suits in Admiralty Act, 46 U.S.C. § 741 *et seq.*, which was passed in 1920. However, there is not a shred of evidence in the legislative history of the 1928 Act to support this conjecture. In any case, it is by no means clear that § 702c, even as construed by the government, operates to bar a damages claim against the United States that is otherwise properly subject to a federal court's admiralty jurisdiction. The Suits in Admiralty Act permits claims against the government for its conduct on navigable waters, while § 702c focuses on the government's management of flood waters. Because of this

More instructive than versions of the Tort Claims Act that were never enacted is the legislative history to the act as passed in 1946. In discussing the "discretionary function" exception to the waiver of immunity under the Tort Claims Act, 28 U.S.C. § 2680(a), the key congressional reports contain the following statement:

> This is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, *such as a flood control or irrigation project*, where no negligence on the part of any Government agent is shown . . . ."

H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942); S. Rep. No. 1196, 77th Cong., 2d Sess. 7 (1942); H.R. Rep. No. 1287, 79th Cong., 1st Sess. 5-6 (1946), *quoted in Dalehite v. United States*, 346 U.S. 15, 29 n.21 (1953) (emphasis added). Clearly, this statement makes no sense if such suits would, in any event, have been barred by section 702c. Moreover, the clear implication of the statement is that flood control injury or damage caused by government agents *is* actionable under the Tort Claims Act where, as here, the "discretionary function" exception does not apply.

The Solicitor General's interpretation of section 702c might have some plausibility if he could point to other statutes, enacted prior to the Tort Claims Act, in which Congress had included similarly superfluous restate-

---

distinction in coverage, the lower federal courts have almost uniformly failed to address § 702c in admiralty actions arising from incidents on the Mississippi River. *See, e.g. Estate of Callas v. United States*, 682 F.2d 613 (7th Cir. 1982); *Buffalo Bayou Trans. Co. v. United States*, 375 F.2d 675 (5th Cir. 1967); *Toney v. United States Army Corps of Engineers*, 397 F. Supp. 307 (M.D. La. 1975). Indeed, in *Respess v. United States*, 586 F. Supp. 861 (E.D. La. 1984)—the only case we are aware of that mentions § 702c in the context of an admiralty claim against the United States—the immunity provision was found inapplicable because the plaintiff's damages were not caused by flood waters. *Id.* at 865.

ments of the government's sovereign immunity. After all, the federal government had long been in the business of constructing bridges, highways, postal buildings and myriad other public works—all activities posing substantial risks of accidental injury or damage. If Congress felt it necessary to codify sovereign immunity in the 1928 Flood Control Act, one would expect it to have done the same in the statutes authorizing these projects. So far as we are aware, however, section 702c is unique in doing what the Solicitor General says it does.

Indeed, the only directly relevant prior legislation confirms our interpretation of section 702c. Until the 1928 Act, the most comprehensive flood control legislation enacted by Congress was the Flood Control Act of 1917, ch. 144, 39 Stat. 948. This statute authorized major expenditures for the construction of flood control projects on the Mississippi and Sacramento rivers. Conspicuously absent from the statute is any disclaimer of liability resembling section 702c. The reason is that, in contrast to the 1928 Act, section 2(b) of the 1917 legislation placed on states and local governments the full responsibility for the purchase of all "rights of way, easements, and lands" necessary for the projects. Because the federal government undertook no commitment to pay for constitutional "takings," much less to provide compensation in excess of Fifth Amendment requirements, there was no need to include a statutory bar of claims against the United States.[19]

---

[19] Subsequent flood control legislation further reinforces the limited purpose of § 702c. The Act of June 15, 1936, ch. 548, § 1, 49 Stat. 1508, expanded the scope of the 1928 statute by authorizing additional flood control projects on the Lower Mississippi River and its tributaries. This 1936 statute does contain an immunity provision similar to § 702c, but the context in which it appears makes clear that it is directed only to the government's liability for the acquisition of rights in property damaged as a result of flood control projects. The statute provides that the federal government will pay for "rights-of-way, easements and flowage rights" for property located in proposed floodways "as soon as the Chief of Engineers is satisfied that such rights-of-way, easements, or flowage rights have

The Solicitor General is correct that section 702c was intended to demarcate the limits of the government's financial obligations in connection with flood control works on the Mississippi River. The problem is that he draws the line in the wrong place. Congress was aware of the government's sovereign immunity and so gave no weight whatever to liability for actions based on the negligence, recklessness, or other tortious acts of federal employees. Section 702c was enacted for the purpose of dealing with the special problem created by Congress' willingness to offer compensation for certain types of property damage that it was not constitutionally required to pay.

II. EVEN IF SECTION 702c BARS ORDINARY TORT CLAIMS, IT HAS NO APPLICABILITY HERE BECAUSE RESPONDENTS' INJURIES AROSE FROM GOVERNMENT EMPLOYEES' MISMANAGEMENT OF RECREATIONAL ACTIVITIES WHOLLY UNRELATED TO FLOOD CONTROL.

We have thus far argued that section 702c operates only to preclude suits against the United States for property damages that are covered by section 702d and the section 702c *proviso*, but which do not rise to the level of a constitutional "taking." Should the Court reject this argument, however, section 702c has no applicability to the claims in this case for the separate reason that the death and injuries arose from the government's mismanagement of *recreational* activities—activities that are neither necessary nor related to flood control. These circumstances place the government's conduct well beyond the scope of section 702c.

If section 702c is to be read as immunizing the government from liability for ordinary torts, the range of

---

been acquired in conformity with local custom or legal procedure in such matters." Section 12 of the statute then states: "[T]hereafter, no liability of any kind shall attach to or rest upon the United States for any further damage by reason of diversions or flood waters." 49 Stat. at 1513 (33 U.S.C. § 702a-10).

activities so immunized must be defined by the purpose for which the provision was enacted. It is a fundamental principle of immunity doctrine, whether based on interpretation of constitutional safeguards, *see, e.g., Hutchinson v. Prozmire*, 443 U.S. 111 (1979); *Doe v. McMillan*, 412 U.S. 306 (1973); *Gravel v. United States*, 408 U.S. 606 (1972) (Speech and Debate Clause), federal statutes, *see, e.g., Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Pierson v. Ray*, 386 U.S. 547 (1967) (42 U.S.C. § 1983), or federal "common law," *see, e.g., Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Butz v. Economou*, 438 U.S. 478 (1978) (immunity of federal officials in constitutional damage suits), that "the sphere of protected action must be related closely to the immunity's justifying purposes," *Nixon v. Fitzgerald, supra*, 457 U.S. at 755. An immunity may "extend[] no further than its justification would warrant." *Harlow v. Fitzgerald, supra*, 457 U.S. at 811.

This principle has been recognized by lower federal courts interpreting section 702c. In *Graci v. United States*, 456 F.2d 20 (5th Cir. 1971), flood damage from a federal water project in the Lower Mississippi River Valley was found actionable, notwithstanding section 702c, because the project was designed and built for navigational purposes, not flood control. Section 702c has also been held inapplicable where government activities causing flood damages were not undertaken pursuant to a congressionally-mandated flood control project. *Peterson v. United States*, 367 F.2d 271 (9th Cir. 1966); *McClaskey v. United States*, 386 F.2d 807, 808 n.1 (9th Cir. 1967); *Parks v. United States*, 370 F.2d 92 (2d Cir. 1966) (dicta). *Cf. Seaboard Coast Line R.R. Co. v. United States*, 473 F.2d 714 (5th Cir. 1973); *United States v. Hunsucker*, 314 F.2d 98 (9th Cir. 1962). And even when property damage is caused by the release of waters from a flood control facility, the government may still be sued if the discharges were for other than flood control purposes. *Hayes v. United States*, 585 F.2d 701 (4th

Cir. 1978). *See also Respess v. United States*, 586 F. Supp. 861, 865-66 (E.D. La. 1984) (government liable for damages caused by navigational hazard, even though damages occurred on flood control project).

Section 702c's limited reach derives from its function as an essential *quid pro quo* in the 1928 Flood Control Act. As discussed earlier, Congress agreed, under pressure from affected states and local governments, to place on the federal government virtually the entire burden for the construction of the flood control projects, as well as the acquisition of flowage rights and other property interests deemed necessary for the building of dams, levees, diversions and other structures. *See* page 17, *supra*. In exchange for this departure from the traditional requirement of local contribution, section 702c was added, stripping property owners and other interests of any remedies against the federal government for damages resulting from flood control activities. This "bargain" is at the core of the 1928 legislation: the federal government would underwrite the costs of protecting persons and property from flood damages; local interests, for their part, would forfeit all claims against the government in the event that those protective measures failed.

Application of section 702c to the claims in this case would effect a radical change in the bargain struck by Congress. Respondents' death and injuries occurred because of the government's negligent regulation and management of recreational activities on the Millwood Reservoir. The government makes flood control reservoirs available for recreational activities and affirmatively encourages the public to use the reservoirs for that purpose. (Pet. App. 28a). However, nothing in the legislative history of the 1928 Act even remotely suggests that recreational activities were contemplated by Congress when it enacted section 702c.[20] Nor can it be argued that such

[20] While flood control was, of course, the central and overriding purpose behind the 1928 statute, the legislative history reveals that Congress was also aware that the massive public works would have incidental benefits for other government functions, such as defense, mail service, and navigation. *See, e.g.*, 69 Cong. Rec. 6723, 6787 (1928). So far as we are aware, however, the extensive legislative history contains not a single reference to the use of flood control projects for recreational activities.

activities are in any way necessary or related to legitimate flood control measures.

Section 702c therefore is simply irrelevant to respondents' claims. The provision immunizes flood control activities, and nothing more. This immunity was the price extracted from local interests in the Lower Mississippi River Valley for the federal government's largess in relieving state governments of all other liabilities for the flood control projects. Persons residing in the affected states assumed the risk that they would absorb losses occasioned by the government's mishandling of flood control activities. They manifestly did *not* assume any similar risk with respect to losses caused by other activities. When the federal government elects to engage in conduct having no connection whatever to flood control, it becomes liable to suit under the Tort Claims Act "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.[21]

The Solicitor General makes no mention of the recreational context in which respondents' claims arose. His analysis of section 702c begins and ends with the proposition that respondents' claims are barred because, at the

[21] Our analysis of § 702c in this regard is somewhat different from that of the court of appeals. Although the court of appeals properly stressed the recreational context in which the government's negligence occurred (Pet. App. 27a, 28a), its conclusion that § 702c did not immunize the government's conduct was premised ultimately on the government's "failure to warn" respondents of the dangerous conditions near the dam structure (*ibid.*). In our view, governmental negligence with respect to a flood control activity subject to § 702c is not necessarily rendered actionable on the basis of a failure to warn of the risk of impending flood damages or injuries. Rather, it is our position that the § 702c immunity simply does not apply to recreational or other activities that are neither necessary nor related to flood control.

time of the death and injuries, the Millwood Reservoir was at flood stage and water was being discharged from the reservoir for flood control purposes. These facts are indisputable—but hardly sufficient to resolve the question of section 702c's applicability. In essence, the Solicitor's position is that the government is immune from suit whenever flood control activity contributes in any way to personal injuries, irrespective of other governmental activities, having nothing to do with flood control, that also contribute to the injuries. That this position vastly overstates the permissible scope of section 702c's immunity can be readily demonstrated by dozens of hypothetical situations. We offer just two for the Court's consideration:

(1) Assume that on the Millwood Reservoir the federal government undertakes to provide a ferry service. Several times a day, government employees carry passengers from one end of the reservoir to the other. When discharges of flood waters lower the level of the reservoir, the ferry must be carefully navigated to avoid subsurface rock formations and other obstacles. One day when flood waters are being discharged at a high rate, the ferry rams into such an underwater obstacle. The ferry sinks and several passengers drown. Subsequent investigation reveals that the government employee operating the ferry was drunk at the time of the incident and that the ferry carried no life preservers.

(2) Assume that the federal government selects a site in the Mississippi River valley for the disposal of toxic wastes. The toxic substances are sealed in large steel drums that are buried deep in the ground. These drums are designed to be leak-proof for hundreds of years. One of them, however, is improperly sealed by government personnel who fail to follow the manufacturer's instructions. Several years after this defective drum is placed in the ground, a major flood submerges the disposal site. As the flooding recedes, leaking toxic substances leach into a stream and are carried into a government flood

control project. Discharges of flood waters from this project send the toxic chemicals downstream, where they immediately contaminate the water supply of a local community. Before the problem is detected, several people die and dozens more become seriously ill.

Under the Solicitor General's theory, section 702c would stand as a complete bar to damage claims against the United States in these hypothetical situations. In each case the injuries occurred against the background of a flood control project and were caused, at least in part, by the discharge of flood waters. That is the end of the inquiry, in the government's view; it matters not at all that another activity constituted an additional cause of the injury, and that the additional activity bears no relation whatever to flood control.

But it is simply inconceivable that Congress could have intended a statutory immunity created for one type of activity and purpose to be expanded in this fashion so as to cover fundamentally different activities undertaken for fundamentally different purposes. A grant of immunity must be narrowly confined to the government conduct for which it was created and that it was intended to protect. *Nixon v. Fitzgerald*, *supra*, 457 U.S. at 755; *Harlow v. Fitzgerald*, *supra*, 457 U.S. at 811. Just as a prosecutor loses his immunity for actions taken in an administrative or investigative role, *see, e.g.*, *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976); *Mancini v. Lester*, 630 F.2d 990, 992 (3d Cir. 1980); *Forsyth v. Kleindienst*, 599 F.2d 1203, 1213-14 (3d Cir. 1979), so federal employees lose the protection of section 702 when they engage in activities having no nexus to flood control. To be sure, the disclaimer of liability in section 702c is an expansive provision, but the immunity conferred has no effect at all where the government's conduct falls outside its intended scope.

It is often the case that property damage or personal injuries will have multiple contributing causes. The appropriate analysis under section 702c, we submit, should

not focus on the relative significance of flood control and non-flood control activities as causative agents in the transaction or events leading to a plaintiff's harm. Such fine factual distinctions, usually reserved for juries in tort cases, need not cloud the purely legal question of section 702c's applicability. Rather, the test should be whether *one* of the causes of injury or damage is governmental negligence with respect to an activity that is not necessary for, or that is unrelated to, flood control. If an activity of that type is simply a "but for" cause, the government may not be excused by section 702c from its responsibility under the Tort Claims Act to exercise reasonable care.

This narrow causation determination is precisely the type of legal inquiry contemplated by the government's theory of section 702c, only in reverse. Under the government's approach, as we understand it, the court must decide whether a flood control activity in connection with a flood control project is a "but for" cause of a plaintiff's damages. If it is, section 702c bars the claim under the Tort Claims Act; there is no need to inquire further concerning the extent to which flood control activities, in contrast to other activities, contributed to the harm. Under our analysis, section 702c is inapplicable when a plaintiff's injury would not have occurred "but for" governmental negligence—or worse—with respect to an activity having nothing to do with flood control.

This approach to section 702c would not significantly expand the government's liability for damages, contrary to the Solicitor General's arguments. While the interpretation of section 702c advanced here has not been articulated in precisely the same way by the lower federal courts, it is nonetheless consistent with the *results* in virtually every reported court of appeals decision involving a government claim of immunity under section 702c. For example, in *National Manufacturing Co. v. United States*, 210 F.2d 263 (8th Cir.), *cert. denied*, 347 U.S. 967 (1954), the principal case on which the Solicitor

General relies, section 702c was held to apply in circumstances where the government's negligence with respect to flood control activities was the sole cause of the plaintiff's property damages. In *Parks v. United States*, *supra*, 370 F.2d at 92-93, another case relied on by the government, the plaintiff's damages were attributable exclusively to "negligence in the . . . construction, maintenance and operation" of a flood control project. And in *Pierce v. United States*, 650 F.2d 202 (9th Cir. 1981), section 702c was successfully invoked where the government had engaged in no conduct, unrelated to flood control, constituting a "but for' cause of the plaintiff's damages. The same is true of almost all other court of appeals decisions construing section 702.[22]

---

[22] *See Portis v. Folk Constr. Co.*, 694 F.2d 520 (8th Cir. 1982); *Aetna Ins. Co. v. United States*, 628 F.2d 1201 (9th Cir. 1980), *cert. denied*, 450 U.S. 1025 (1981); *Burlison v. United States*, 627 F.2d 119 (8th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981); *Taylor v. United States*, 590 F.2d 263 (8th Cir. 1979); *Lenoir v. Porters Creek Watershed Dist.*, 586 F.2d 1081 (6th Cir. 1978); *Callaway v. United States*, 568 F.2d 684 (10th Cir. 1978); *Florida East Coast Railway Co. v. United States*, 519 F.2d 1184 (5th Cir. 1975); *National By-Products, Inc. v. United States*, 405 F.2d 1256 (Ct. Cl. 1969); *McClaskey v. United States*, 386 F.2d 807 (9th Cir. 1967); *Amino Bros. Co. v. United States*, 372 F.2d 485 (Ct. Cl.), *cert. denied*, 389 U.S. 846 (1967); *Stover v. United States*, 332 F.2d 204 (9th Cir.), *cert. denied*, 379 U.S. 922 (1964); *Tillman v. United States*, 232 F.2d 511 (9th Cir.), *cert. denied*, 352 U.S. 842 (1956). As discussed earlier, a number of courts have squarely held that § 702c provides no protection to the government for activities unrelated to a flood control project. *See Peterson v. United States*, *supra*; *Graci v. United States*, *supra*; *McClaskey v. United States*, *supra*. Moreover, in *Hayes v. United States*, *supra*, the Court of Appeals for the Fourth Circuit held that § 702c was inapplicable where non-flood control activities were the cause of damage, even though they occurred on a flood control project. *But see Morici Corp. v. United States*, 681 F.2d 645 (9th Cir. 1982) (§ 702c applies so long as damages occurred in connection with operation of flood control project). In addition, our approach here is consistent with the courts of appeals decisions involving cases brought under the Suits in Admiralty Act, which never mention § 702c. *See* note 18, *supra*. While a number of those cases involved accidents on flood waters,

In sum, section 702c offers no protection to the government here because respondents' death and injuries would not have occurred in the absence of the government's mismanagement of recreational activities on the Millwood Reservoir—activities having nothing to do with flood control. On the facts of this case, section 702c cannot bar respondents' claims under the Tort Claims Act.

III. SECTION 702c DOES NOT APPLY TO THE GOVERNMENT'S CONDUCT IN THIS CASE BECAUSE THE MILLWOOD RESERVOIR, WHERE THE DEATH AND INJURIES OCCURRED, WAS NOT AUTHORIZED BY THE 1928 FLOOD CONTROL ACT OR SUBSEQUENT AMENDING LEGISLATION.

Even if section 702c shields the government from ordinary tort claims predicated on activities having nothing to do with flood control, this immunity is of no avail to the government in this case because section 702c applies only to projects on the lower Mississippi River Valley authorized in the 1928 Act or subsequent legislation creating additional projects in that region. Contrary to the government's assertion, it has no relevance at all to flood works not designated by Congress as part of the Lower Mississippi River Valley project.[23]

The Millwood Reservoir is not a part of the vast network of levees, diversions, reservoirs, and other flood control projects authorized by the 1928 Act and subsequent amending legislation as part of the Lower Mississippi River Valley project. Instead, it is part of the "Red-Ouachita River Basin" project, created by Congress as one of numerous geographically distinct flood control regions. The Red-Ouachita River Basin project was authorized in the 1946 Flood Control Act, *supra*, 60 Stat.

---

the government's liability stemmed from activities unrelated to flood control.

[23] The Court below came to the same conclusion (Pet. App. at 24a n.23), although it did not rely on §702c's geographic limitation in reaching its final decision.

at 647, and expanded to include the Millwood Reservoir in the 1958 Flood Control Act, *supra*, 72 Stat. at 309. Both the 1946 and 1958 Acts are completely silent on the question of immunity from tort damages.

Under these circumstances, section 702c can be said to apply to the Millwood Reservoir only if it has been incorporated *sub silentio* into each and every flood control statute ever enacted. This, in essence, is the Government's position. While some lower federal courts have interpreted section 702c in this way, see pages 45-46, *infra*, it is an interpretation that simply cannot be squared with the history of federal flood control legislation enacted after 1928. Congress confined section 702c to projects in the Lower Mississippi River Valley because the immunity of that provision was not needed elsewhere. As discussed at length in the first section of this brief, section 702c serves the purpose of cabining the government's liability for "flowage" rights and other property interests under section 702d and the *proviso* to section 702c. But this concern is unique to flood control projects authorized or contemplated by the 1928 Act. Because later statutes creating flood works in different flood control regions do not purport to provide remedies in excess of constitutional requirements, application of section 702c to those projects would serve no purpose.

Congress knew how to carry forward provisions from one flood control statute to another; when it intended to incorporate provisions of the 1928 Act, it did so explicitly. This is illustrated by the juxtaposition of two flood control laws passed within a week of each other in 1936. The first of these statutes, Act of June 15, 1936, ch. 548, § 1, 49 Stat. 1508, authorizes additional projects in the Lower Mississippi River Valley and is expressly designated by Congress as an amendment and modification to the 1928 Act. The second statute, Act of June 22, 1936, ch. 688, 49 Stat. 1570, 1572-92, provides for numerous flood control projects *outside* the lower Mississippi River region and expressly states that it is *not* an amend-

ment to the 1928 Act. See page 45, *infra*. Clearly, the first of the 1936 statutes carries forward section 702c; the second does not.

The same pattern is revealed in later flood control legislation. For example, the Act of June 28, 1938, ch. 795, 52 Stat. 1215, separately authorizes flood control projects within the Lower Mississippi River Valley, and flood control projects in other, geographically distinct, flood control regions. The provisions regarding the former projects are explicitly designated as amendments to the 1928 Act (52 Stat. at 1220), while the provisions regarding the latter projects either incorporate other flood control statutes or stand by themselves (52 Stat. at 1216-20). Similarly, the Act of Aug. 18, 1941, ch. 377, 55 Stat. 638, expressly amends and modifies the 1928 Act in authorizing new flood works in the Lower Mississippi River Valley (55 Stat. at 642). However, myriad other flood control projects and funding authorizations contained in the 1941 legislation make no reference whatever to the 1928 Act.[24]

That the 1928 Act applies only where Congress says it applies is confirmed by the 1946 flood control statute that was later amended to authorize construction of the Millwood Reservoir. The 1946 Act provides separately for flood control projects in the Lower Mississippi River Valley and flood control projects outside that region, specifically including the Red-Ouachita River basin. The provisions dealing with the Lower Mississippi River—and *only* those provisions—are set forth as a modification to "the project for flood improvement of the lower Missis-

[24] The various flood control acts make clear that it was not unusual for different projects to be governed by different standards. *See, e.g.*, 1946 Act, *supra*, 60 Stat. at 644 (imposing special requirements on local interests with respect to the Savage River Dam as part of the Potomac River Basin project); 1938 Act, *supra*, 52 Stat. at 1273 (providing for special reimbursement to local interests for the Ohio River Basin project).

sippi River adopted by the Act approved May 15, 1928." 60 Stat. at 645. Moreover, the provisions of the 1946 statute dealing with the Red-Ouachita River basin project are expressly directed to areas "*above* the jurisdiction of the Mississippi River Commission." 60 Stat. at 647 (emphasis added). This is the commission that had been charged under the 1928 Act to oversee the design of flood works contemplated by that Act. 1928 Act, *supra*, § 8, 45 Stat. at 537 (33 U.S.C. 702h).[25]

This consistent pattern of express amendments and modifications to the 1928 Flood Control Act leaves no room to argue that section 702c applies *sub silentio* to flood control projects, like the Red-Ouachita River basin project, that were *not* authorized as amendments or modifications to the 1928 Act. But additional considerations further undercut the government's theory of section 702c's universal applicability.

The Solicitor General's position takes no account of the fact that later flood control statutes contain their own separate immunity provisions. For example, in section 3 of the Act of June 22, 1936 (33 U.S.C. 701c), the second of the 1936 statutes, Congress requires states directly affected by projects authorized in that legislation to "hold and save the United States free from damages due to construction work." The inclusion of this provision in the 1936 Act simply makes no sense if the same Act otherwise incorporates the disclaimer of liability clause of section 702c. Any damages to person or property attributa-

[25] We note parenthetically that the breadth of the language of § 702c provides no special reason for supposing that that provision, in contrast to other sections of the 1928 Act, is incorporated *sub silentio* into later flood control statutes. Other flood control legislation contains equally emphatic and expansive language. For example, the 1938 Flood Control Act, *supra*, 52 Stat. at 1215 (emphasis added), states that "[s]ection 3 of the Act of June 22, 1936 . . . as herein modified, shall apply to *all* flood control projects, except as otherwise specifically provided by law." Nonetheless, subsequent flood control statutes incorporate this provision expressly. *See, e.g.*, 1958 Act, *supra*, § 201, 72 Stat. at 305; 1946 Act *supra*, § 2, 60 Stat. at 641; 1941 Act, *supra*, § 2, 55 Stat. at 638.

ble to construction of flood control projects would already be covered by the language of section 702c, at least as interpreted by the government here. Obviously, Congress would not at the same time have incorporated section 702c *sub silentio* into this 1936 Act and prescribed a separate immunity provision that is narrower in scope than section 702c.

Other liabilities and obligations placed on the federal government in later flood control legislation are similarly inconsistent with the provisions of the 1928 statute. For example, the same 1936 Act requires states and local governments to contribute substantially to the cost of flood control projects. *See* 33 U.S.C. 701c. This is in marked contrast to the 1928 legislation which, as discussed earlier, places on the federal government virtually the entire burden for flood control projects authorized in that statute. See page 17, *supra*,[26] If Congress meant to apply section 702c in this later statute, while at the same time effecting so radical a change in the government's other financial responsibilities, section 702c would have been incorporated explicitly. The alteration in the federal-state cost allocation for flood control projects makes clear that Congress intended the government's responsibilities under the 1936 Act to be fundamentally different from its responsibilities with respect to projects authorized in the 1928 Act and subsequent amending legislation.

These arguments apply with special force to the 1946 flood control legislation authorizing the Red-Ouachita River basin project, of which the Millwood Reservoir is a part. The same Congress that enacted that statute also passed the Federal Tort Claims Act. Because the latter legislation was one of the major congressional undertakings of that year, Congress' attention was clearly focused on the question of the government's amenability to suit.

[26] The cost-allocation scheme of the 1936 Act was amended by later legislation (*see* 1938 Act, *supra*, § 2, 52 Stat. at 1215) and, as amended, expressly carried forward to subsequent flood control statutes (*see, e.g.*, 1946 Act, *supra*, § 2, 60 Stat. at 641).

In view of the fact that post-1928 flood control statutes use explicit language when carrying forward provisions from the 1928 Act, and in view of the fact that other statutes contain their own immunity provisions, Congress' silence in the 1946 Flood Control Act on the question of damages compels only one conclusion: it did not intend section 702c to apply to flood control projects authorized in that statute.

The doctrine of section 702c's universal applicability derives from *National Manufacturing Co. v. United States*, *supra*. That case involved property damages caused by alleged government negligence in the management of flood projects on the Kansas River that had been authorized by the second 1936 Act, *supra*, 49 Stat. at 1588. In holding that section 702c extended to the Kansas River, the court relied on section 8 of the 1936 statute, 49 Stat. at 1596 (33 U.S.C. 701e), which states that the statute "shall [not] be construed as repealing or amending any provision of [the 1928 Flood Control Act]." 210 F.2d at 270. However, this analysis of section 702c misses the point of the quoted provision from the 1936 Act. The language means precisely what it says: the 1936 statute does not repeal or amend the 1928 Act *with respect to projects in the Lower Mississippi River Valley authorized by the 1928 Act*. It hardly follows that the 1936 Act carries forward the provisions of the 1928 Act, including section 702c, to projects authorized for the first time in 1936 and having nothing to do with the lower Mississippi River. As discussed earlier, this interpretation ignores other provisions of the 1936 statute that are directly at odds with the 1928 Act.

But even if the 1936 statute can be said to incorporate section 702c, there is absolutely no basis for extending it further to later flood control statutes, like the 1946 Act authorizing the Red-Ouachita River Basin Project, that do *not* contain any comparable "nonrepeal" language. A handful of lower courts, however, have not paused over this critical difference in expanding the reach of 702c to

every flood control project in the country. *See, e.g., Aetna Insurance Co. v. United States*, 628 F.2d 1201, 1204 (9th Cir. 1980), *cert. denied*, 450 U.S. 1025 (1981); *Lenoir v. Porters Creek Watershed District*, 586 F.2d 1081, 1086 & n. 4 (6th Cir. 1978). These decisions have relied on nothing more than a perceived national "policy" in favor of immunity in all federal flood control activities. This policy, however, has never been adopted by Congress; it is entirely the creation of the lower federal courts, at the urging of the Justice Department.

The doctrine of section 702c's universal applicability is therefore insupportable when analyzed against the background of subsequent flood control legislation, including the legislation pertaining to the Millwood Reservoir. Section 702c and other provisions of the 1928 Act are carried forward to those subsequent statutes expressly amending and modifying the 1928 Act in authorizations for additional flood control projects in the Lower Mississippi River Valley. That is the full extent of section 702c's applicability.

IV. BECAUSE THE LOWER COURTS' INTERPRETATIONS OF SECTION 702c HAVE BEEN ANYTHING BUT CONSISTENT, THERE IS NO BASIS FOR ARGUING THAT CONGRESS, THROUGH ITS SILENCE, HAS IMPLIEDLY ENDORSED THE POSITION URGED BY THE GOVERNMENT HERE.

The government urges this Court *not* to take a close look at section 702c's legislative history, the purpose for which the immunity was granted, or the 1928 Act's interrelationship with subsequent flood control legislation. This is unnecessary, the Solicitor General contends, because Congress has impliedly acquiesced in the lower courts' "long-standing" interpretation of section 702c "as a broad grant of immunity from tort liability for damage caused by flood waters.'" This argument can be briefly disposed of.

To begin with, the lengthy history of litigation under section 702c has never presented Congress with a definitive ruling on the type of claim presented here. Of the nearly two dozen court of appeals decisions involving section 702c, none has ever interpreted that provision as a bar to tort claims for personal injuries (*see* Pet. App. 19a n.16 (and cases cited therein)); only property damage has been found noncompensable because of the immunity conferred by section 702c. This pattern of appellate decisions is consistent with the argument advanced in the first section of this brief: as a preclusion of claims under the *proviso* to section 702c and the compensation clause of section 702d, section 702c might be read to extend to analogous suits seeking recovery for property damages, but has no effect on suits seeking recovery for personal injuries.

Moreover, the lower federal courts have not spoken with a single voice in their interpretation of section 702c. For example, some courts have held that section 702c insulates the government from liability only where damaging flood waters are the result of a hurricane or other natural, rather than man-made, climactic condition. *See, e.g., Guy F. Atkinson Co. v. Merritt, Chapman & Scott Corp.*, 126 F. Supp. 406 (N.D. Cal. 1954); *Valley Cattle Company v. United States*, 258 F. Supp. 12 (D. Hawaii 1956); *Stover v. United States*, 204 F. Supp. 477 (N.D. Cal. 1962), *aff'd*, 332 F.2d 204 (9th Cir.) *cert. denied*, 379 U.S. 922 (1964). Other courts have rejected this approach. *See, e.g., Burlison v. United States, supra*; *Lunsford v. United States*, 570 F.2d 221, 228 n.13 (8th Cir. 1977).

Similarly, a number of federal courts have ruled that the presence of flood waters, without more, is insufficient to trigger the protection of section 702c. As discussed earlier, see pages 33-34, *supra*, these courts have imposed the additional requirement of a nexus between the flood conditions causing a plaintiff's damages and a government project built for flood control purposes. *See, e.g., Peterson v. United States, supra*; *Graci v. United States*,

supra; *see also Parks v. United States*, *supra*. Other courts, while not expressly rejecting this limiting principle, have construed section 702c more broadly, suggesting that the provision would apply even to projects unrelated to flood control. *See, e.g., National Manufacturing Co. v. United States*, *supra*.

Still another disagreement among the lower courts concerns the relevance of the governmental purpose underlying the release of flood waters or the creation of other harm-producing conditions. In *Hayes v. United States*, *supra*, for example, the Fourth Circuit held that the government could not take refuge in section 702c where the challenged discharge of flood waters was made for recreational purposes, rather than to regulate flood waters. *See also Respess v. United States*, *supra*, 586 F. Supp. at 865-66. Other courts have rejected this interpretation of section 702c, holding that the determinative factor is whether the government's negligence occurred in the management of a flood control project, irrespective of whether the government's actions also had a flood control objective. *See, e.g., Morici Corporation v. United States*, *supra*.

We mention these cases not, at this point, to argue one side or the other of the judicial disagreements concerning section 702c, but simply to point out that there exist significant disagreements. Under these circumstances, nothing can be inferred either way from the fact that Congress has not felt compelled to amend section 702c. There is no consistent or long-standing interpretation of section 702c, dispositive of respondents' claims in this case, in which Congress fairly can be said to have acquiesced.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

Of Counsel:
PETER E. SCHEER
JOSEPH N. ONEK
PAUL J. VAN DE GRAAF
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

T. JOHN WARD
(Counsel of Record)
SHARP, WARD, PRICE,
HIGHTOWER & SEARCY
Post Office Drawer 3106
Longview, Texas 75606
(214) 757-2880

RESPONDENT'S

BRIEF

Supreme Court, U.S.
FILED
FEB 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-434

In The
Supreme Court of the United States
October Term, 1985

UNITED STATES OF AMERICA,
Petitioner,

v.

CHARLOTTE JAMES

UNITED STATES OF AMERICA,
Petitioner,

v.

KATHY BUTLER, INDIVIDUALLY AND AS SURVIVING WIFE AND HEIR OF EDDY BUTLER

UNITED STATES OF AMERICA,
Petitioner,

v.

SUSAN B. CLARDY, INDIVIDUALLY AND AS NATURAL TUTRIX OF THE MINORS, BRIDGET MARIE CLARDY AND KENNETH CLARDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS SUSAN B. CLARDY, AND AS NATURAL TUTRIX FOR BRIDGET MARIE CLARDY AND KENNETH CLARDY

SAM J. D'AMICO
J. MICHAEL MCDONALD
Attorneys for Respondents

D'AMICO, CURET & DAMPF
263 Riverside Mall, Suite 610
Baton Rouge, La. 70801
(504) 387-2273

COCKLE
BEST AVAILABLE COPY

QUESTION PRESENTED

The extent and nature of immunity afforded to the United States by 33 U.S.C. 702(C).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTE INVOLVED

33 U.S.C. 702(C) provides in pertinent part:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* that if in carrying out the purposes of . . . this title it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of the Army and the Chief of Engineers to institute proceedings on behalf of the United States to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

———o———

STATEMENT OF THE CASE

On May 17, 1980, Kenneth Clardy and his father, Joseph Clardy were fishing along Bayou Courtableau, a United States flood control project designed to direct waters from Bayou Courtableau Basin through the West Atchafalya Basin protection levee in Louisiana. The gates to the structure were opened wide creating a strong current. Two faded warning signs were posted a short distance upstream of the control structure. The Clardy's boat became disabled and began to drift toward the mouth of the control structure where it capsized. The boat and

the passengers were all swept through the gates by the current. Kenneth Clardy drowned; his father survived. Suit was filed by the widow of Kenneth Clardy for his wrongful death, both for herself and on behalf of their two minor children.

Defendant, United States of America, filed a Motion to Dismiss the complaint claiming the court lacked jurisdiction of the subject matter of the suit by virtue of immunity conferred by 33 U.S.C. 702(C). The district court converted this to a motion for summary judgment which was granted (App. 59a-65a). Plaintiff appealed and the matter was consolidated with that of Charlotte James and Kathy Butler. The panel reluctantly affirmed the judgment of the district court because it was bound by two previous de-decisions of the Fifth Circuit.[1] They concluded that Congress only intended to disclaim liability for the taking of property and not for consequential damages (App. 55a). They felt the immunity provision had to be interpreted this way since the government was already immune from liability in tort as the Federal Tort Claims Act was not enacted until 1946, some eighteen years later. A rehearing en banc was requested and granted and the Fifth Circuit reversed the lower courts. The full court referred to the legislative history of the statute, as had the panel, to determine the "intent" of Congress in enacting the immunity clause. They determined that the "government is not liable for any fault of its employees in controlling floodgates or managing lands to contain, prevent, or manage floods or floodwaters. This immunity, however, does not extend to the fault of government employees in fail-

[1] *Florida East Coast Railway v. United States,* 519 F.2d 1184 (5th Cir. 1975); *Graci v. United States,* 456 F.2d 20 (5th Cir. 1971).

ing to warn the public of the existence of hazards to their accepted use of government-impounded water, or nearby land" (App. 27a-28a). From this decision, the United States requested a writ of certiorari which was granted.

SUMMARY OF ARGUMENT

After the great flood of 1927, Congress recognized the need to enact legislation for the control of flooding on the Mississippi River. Two proposals were forthcoming—that of the Chief of Engineers of the U.S. Army, Maj. Gen. Edgar Jadwin and that of the Mississippi River Commission. Many witnesses testified before hearing on these plans. Congress eventually adopted a plan involving a system of levees and outlets or spillways to relieve the high water pressure in the Mississippi. As part of this project, the Bayou Courtableau Control Structure was constructed in 1956 to assist in drainage of the headwaters of Bayou Teche during periods of high water. This flooding was largely the result of construction of the guide levees along the West Atchafalya Spillway. During the debates and hearings on the Flood Control Act of 1928, the issue of "damages" was frequently mentioned. However, the only context in which anyone discussed this issue was concerning damages involved in the acquisition of land, and those involved in the relocation of property. No one discussed the type of damages involved in this case. Indeed, at the time of these discussions and hearings, the federal government was immune from suit in tort as the Federal Tort Claims Act had yet to be adopted. No

one was concerned with these consequential damages since the government already had absolute immunity. Thus, the damages contemplated by the statute were those involving the acquisition of property. The government was going to expend a tremendous sum of money for this flood control project and wanted to insure that it would not incur further costs after the commencement of the project in the acquisition of property for the project or in the acquisition of flowage rights or easements. For this reason the immunity clause of 33 U.S.C. 702(C) was enacted.

The courts, however, have been struggling for many years as to the meaning of this statute and the extent of its applicability. Most of the cases have involved overground floodwaters and the loss of property. In most cases, the courts have granted immunity to the government. However, if the flooding was caused by a project which was not a flood control project as in *Graci v. United States*, 456 F. 2d 20 (5th Cir. 1971) or *Peterson v. United States*, 367 F. 2d 271 (9th Cir. 1966) the courts have not extended the grant of immunity. Therefore, the mere existence of a flood control project does not automatically confer a grant of immunity. Several courts have tackled the question of multipurpose facilities and those in which the damage was caused by a use of the facility which was other than for flood control. In *Hayes v. United States*, 585 F. 2d 701 (4th Cir. 1978), the court reasoned that if the facility were a dual purpose facility and the negligent action was related to a recreational use of the impounded waters, then the government should enjoy no immunity. The majority in the present case reached the same conclusion. They reasoned that the negligence could be in

failing to warn the public of hazards to accepted use of the impounded waters, or nearby land. This type of negligence would give rise to no immunity and the government would be liable for any damages arising therefrom. However, if the fault of the employee arose out of controlling floodgates or managing lands to contain, prevent, or manage floods or floodwaters, then there would be no liability and the government would be immune.[2] The damage suffered by the Clardy's was due to a failure to warn or inadequate warnings to recreational users of the impounded waters on Bayou Courtableau. Therefore, the judgment of the court of appeals should be affirmed and the matter should be remanded.

———o———

ARGUMENT

The United States is granted immunity by 33 U.S.C. 702 (C). However, the question is the extent and type of immunity which is granted by this statute. Normally, statutory language will control the meaning of the statute.[3] However, where the language is unclear or ambiguous, it is necessary to resort to the legislative history to determine its meaning.

In the majority opinion, Judge Reavley addressed this issue and concluded that the language of this statute is

———

[2]App. 27a-28a.

[3]*American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982); *Escondido Mutual Water Co. v. La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians*, — U.S. —, 104 S. Ct. 2105 (1984).

ambiguous and not clear cut.[4] Part of the latent ambiguity is because of the lack of a need for the immunity clause. At the time of the enactment of the Mississippi River Control Act in 1928, the Federal Tort Claims Act had not been enacted. Thus, the government enjoyed immunity in tort from the type liability the government claims is envisioned by the statute. Because of this ambiguity, it is necessary to examine the legislative intent for the immunity clause and the meaning of the statutory language at the time of the enactment of the statute. In order to better understand the intent of the redactors of this provision, it is necessary to understand the historical perspective in which it was enacted.

In 1927, the Mississippi River broke through the levees built to contain it and flooded over 18,000 square miles of land. More than 246 people were killed, over 700,000 were driven from their homes, and over a million and a half farm animals were killed. Industry and commerce were paralyzed, communication and transportation lines were interrupted, and the U. S. mail was delayed. Total losses were many hundreds of millions of dollars.[5] This vast amount of destruction and loss prompted Secretary of Commerce, Herbert Hoover, to refer to this flood as America's greatest peace time disaster and President Calvin Coolidge stated that its recurrence should be forever prevented.[6]

---

[4]App. 6a-7a.

[5]H.R. Rep. No. 1072, 70th Cong., 1st Sess. p. 3 (1928).

[6]*Id.* at 5

Originially levee construction was a local or private matter delegated to individual riparian landowners. As flooding increased due to artificial drainage, levee districts were formed by several neighbors effected by the possibility of flooding by the local river.

The Mississippi River, being the great source of transportation, navigation, and commerce for the very heart of the nation received the attention of the U. S. Army with its vast engineering resources. After much study they determined that a system of levees was necessary to insure its navigability. In 1879 Congress created the Mississippi River Commission to give "ease and safety to navigation of the Mississippi River and preventing destructive floods, promoting and facilitating commerce, trade, and the Postal Service."[7]

However, the emphasis was on navigation rather than on flood control. Appropriations prior to 1890 had expressly prohibited the expenditure of funds for the construction or repair of levees to prevent injury to lands caused by overflow. The formation of the Mississippi River Commission and the appropriation of funds for the construction of levees was for aiding navigation, rather than controlling overflowage. Not until 1917 subsequent to the creation of the House Committee on Flood Control were appropriations made for levee construction to control flooding, and then only if local entities shared in the costs.[8]

Between 1882 and December 31, 1926, a total of $238,-101,449.03 was expended for the construction of levees.

---

[7]*Id.* at 6.

[8]*Id.* at 6, 7.

The federal government spent approximately $86,148,-000.00 from either government or contributed funds or 37% of the total cost. State and local organizations spent approximately $151,953,000.00 or 63% of the total cost for this project.[9] The Mississippi River Commission policy of controlling flooding solely through the use of levees has been dubbed the "levees only" policy and received sharp criticism from the various witnesses and committees considering flood control legislation in 1928.[10]

---

[9]S. Rep. No. 619, 70th Cong. 1st Sess., p. 20 (1928).

[10]In its Report No. 1072, The House Committee on Flood Control criticized the Commission and its levees only policy as follows:

"The commission itself, a purely Federal agency, making its participation in the cost of the work dependent upon the acceptance by local districts of its arbitrary ruling, adopted and adhered to a policy of 'levees only.' Time and again it contended in public utterances and in the records that it was only by confining the river to its bed by a system of levees that floods could be averted and the flood waters of the Mississippi carried safely to the sea. The commission was intolerant with any other viewpoint and successfully resisted any effort to change its policy as well as discouraging any suggestion to investigate any other proposal.

In the pursuit of this policy, the commission went a step further. It held to the view that in support of the 'levees only' theory every outlet of the river but one should be closed and did succeed in closing them all except the Atchafalya Gap and the mouth of the river at the Passes.

The result of this policy is now part of the tragic history of flood control on the lower Mississippi in our own times. Five devastating epochal floods have visited the valley since the establishment of the commission. On the crest of each, millions of dollars of property have been borne out to sea. Countless thousands of patient, toiling people have been driven from their homes. Disease and sickness, the direct result at times of these

(Continued on next page)

Two new plans were forthcoming to resolve the problem of flooding on the Mississippi River—one formulated and proposed by Maj. Gen. Edgar Jadwin, Chief of Engineers for the U. S. Army and one proposed by the Mississippi River Commission. Both proposed a system of levees and spillways to solve the problem. Both provided for diversion channels to carry excess water than the amount advisable to confine between the levees on the main river. However, there was much debate and discussion concerning the differences between the two. Many witnesses testified before committees of both houses in opposition to the plans and to the need for flood control.

One area of concern was the subject of local contribution. The Jadwin Plan estimated the cost of the project to be $185,400,000.00 for flood control and $111,000,000.00 for channel stabilization and mapping for a total of $296,400,-000.00 Jadwin recommended the federal government paying 80% of the total amount allocated to flood control works with the state and local entities paying the additional 20%. The Commission estimated that cost, however, to be $775,000,000.00 and allocated the entire cost of the project to the federal government. This large difference

---

(Continued from previous page)

floods, have taken the lives of hundreds. In 1882, 1906, 1912, 1913, 1922, and 1927 floods occurred and upon each occasion advanced students of flood control protested in vain against adherence by the commission to this policy of 'levees only,' to be told by the commission, a Federal agency with practically arbitrary power, that the policy of 'levees only' would be retained by the commission but that after each flood the levees would be built higher and stronger. Then came the flood of 1927 and the commission confessed its policy to have been a mistaken one and that not only did the river need levees but additional outlets as well to discharge its flood capacity." H. R. Rep. No. 1072, 70th Cong., 1st Sess. p. 83 (1928).

was because the Jadwin Plan did "not include the cost of rights of way for flood control works, the cost of any drainage works required therewith nor the cost of any flowage rights that may be required, nor damages, if any, resulting from the execution of the plan. No rights of way or damage arise in connection with the navigation works.[11] Thus, the Jadwin Plan called for the federal government to pay $285,960,000.00 and the local interest to pay $37,440,000.00. Additionally, Jadwin states, "The local interests are also expected, under the project, to furnish for flowage easements and damages.[12] Congress, when faced with the question of whether the United States or the individual states and local agencies should bear the major cost of the flood control program, reached a compromise. The states would be required to provide all of the rights of way necessary for the construction of the flood-control works, but would not be required to expend any additional monies. The principle of local contribution was adopted, but the amounts already spent were accepted as full compliance.[13] The United States would provide for the full cost of the construction of the project. By waiving further state contribution, the United States assumed a greater financial responsibility than it had initially planned. It was against this backdrop of concern for the total cost of the project that the immunity clause of 702(C) was adopted.

In analyzing the debates and committee testimony associated with the passage of 33 U.S.C. 702(C) the question of damages arose frequently. In each instance however, it

[11]S. Rep. No. 619, 70th Cong., 1st Sess., p. 18 (1928).

[12]*Id.* at 21.

[13]H. R. Rep. No. 1100, 70th Cong., 1st Sess., p. 3 (1928).

concerned the question of taking of property and who would pay for it.[14] The history of the disclaimer clause

[14]President Calvin Coolidge in his report to Congress on December 8, 1927, addressed the damages issue involved in the construction of the project. He stated, "It is axiomatic that States and other local authorities should supply all land and assume all pecuniary responsibility for damages that may result from the execution of this project." S. Rep. No. 619, 70th Cong. 1st Sess., p. 12 (1928).

Maj. Gen. Jadwin also considered the damages to encompass those involved in the construction of the project. In computing the total cost of the project, he emphasizes that it "does not include the costs of rights of way for flood control works, the cost of any drainage works required therewith nor the cost of any flowage rights that may be required, *nor damages, if any, resulting from the execution of the plan.*" (*Id.* at 18. Emphasis added).

This theme concerning damages is echoed throughout the presentation of his plan. In his summary of the project, he explains that the States must meet three criteria before any funds are expended within that state:

> 1. Provide without cost to the United States, the rights of way for all levee structures and drainage works,
>
> 2. Consent to maintain the levee at the head of the floodways,
>
> 3. *Agree to hold and save the United States free from all damage claims resulting from the construction of the project.* *Id.* at 44 (Emphasis added)

Mr. Leroy Percy of Greenville, Mississippi, in commenting on the Jadwin proposal makes the following comment concerning the acquisition of property and the payment for it:

> The acquisition of flowage rights by the State or local interests may be necessary in these cases. In any case, the lands should remain in private ownership in order that their productive capacity may be fully availed of. The United States does not in general own the bed of navigable streams; much less need it own land flooded only at long intervals. Damages, if any, which may be found legal and proper as a consequence of the plan should be met by the States, since these will be directly benefited by the works. S. Rep. No. 619, 70th Cong., 1st Sess., p. 19 (1928).

makes this all too clear. It began in Senate Bill 3740, Section 4 providing for "compensation for property used, taken, damaged or destroyed in executing the project, and for damages to public corporations through the necessity of adjusting or relocating properties to conform to the project, with the proviso that benefits resulting from the project may be weighed against damages caused by it.[15] This included expenses to railroads or others in changing their property.[16]

Section 4 came under heavy attack because of its compensation clauses which provided governmental liability for damages greatly exceeding those constitutionally mandated. Congressman Reid and Koch both opposed it because it would increase litigation and cause increased losses to the government. They felt it overly burdensome and would greatly enlarge the costs already incurred in normal expropriations.[17]

---

[15]H. R. Rep. No. 1100, 70th Cong., 1st Sess., p. 3 (1928).

[16]*Id.* at 12.

[17]Representative Koch:

Section 4 contains vicious provisions. Who the author was of said Section 4 I do not know, but I feel very certain that it originated in some railroad office. The purpose of that section is to give the railroads in the Mississippi Valley an unfair and unjust advantage. If left in the bill it will make the railroads a present of many millions of dollars over and above just compensation. Under the Constitution, as provided in the Fifth Amendment thereto, private property cannot be taken for public use without just compensation. That phrase fixes the damages to which everybody is entitled in condemnation proceedings when property is taken for public use by the United States Government . . .

(Continued on following page)

It is clear from the House debate that the only damages which Congress was concerned with paying were those to which citizens were entitled pursuant to the Constitution, those related or consequent to the taking of private property for public purposes. It was not mentioned at any time in any congressional debate that consequential damages in tort were recoverable and should be excluded in the passage of the Act.

In a conference committee, Section 4 was modified by two amendments as follows:

(Continued from previous page)

the retention of section 4 as it now reads will mean a vast amount of litigation and ultimately great loss to the Government. In any event, why should anybody be given more than the Constitution of the United States plainly directs? Everybody is entitled to just damages. All of the language in section 4 of the bill enlarging the rule of damages fixed by the Constitution of the United States should be striken out.

Congressional Record—House (70th Cong., 1st Sess.) 6712 (March 28, 1928).

Congressman Reid:

This section is very vicious and might prove very disastrous to the country. The provisions in it would require the Government to pay money for the rebuilding of railroads and other public corporations, and if a village should be interrupted by the building of a floodway within its limits the Government would be responsible.

There is now a provision in the law whereby citizens may receive just compensation in the courts and that should be sufficient. But to commit the Government to a provision fraught with danger and enormous expenditures from which scandals may accrue would be unreasonable. It might in time reflect back to Congress, and therefore, it is my opinion that this section should be eliminated entirely.

Congressional Record—House (70th Congress, 1st Session) 6718 (April 18, 1928).

Amendment 15:

The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: Provided, that in all cases where the execution of the flood control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid.

Amendment 14:

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: Provided, however, That if in carrying out the purposes of this act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.[18]

This was the first such disclaimer of liability for "damages" to appear. Congressman Frank Reid of Illinois wanted it clearly set forth in the Act that the Government was not opening itself up to those extended liabilities (above those allowed by the Constitution) originally set forth is Section 4 of the Senate version which would have the Government responsible for all rights of way and damages, including expenses to railroads or states in the changing of their property. Those types of extended dam-

[18]S. Doc., No. 91, 70th Cong., 1st Sess. 1 (1928) (Conference Report).

ages which the Government could not afford to assume are the types of damages Congress wanted to make certain were clearly excluded in the passage of the Act.

In testimony during the hearings on the various bills, in the reports of the committees, and of Maj. Gen. Jadwin and the Mississippi River Commission, damages are always used in the context of the construction of the flood control project. The references all discuss compensation for the taking of land, use of land, or relocation of public service corporation property. There is no discussion of consequential damages. In its brief, the government references both *Webster's Third New World International Dictionary* and *Black's Law Dictionary* for the definition of "damages." They conclude, and we readily agree, that the term contemplates either loss or injury to both property and the person. However, in 1928, when Congress enacted the immunity clause in 702(C) of the Mississippi River Control Act, they were referring only to loss or injury to property. As previously mentioned, the government had no liability for consequential injuries in tort as there was no such cause of action until the Federal Tort Claims Act of 1946.

The type of damage envisioned and contemplated in all these proceedings and subsequently in 33 U.S.C. 702(C) was explained by H. Generes Dufour, an attorney from New Orleans and a member of the Mayor's Flood Policy Committee in the City of New Orleans appearing before the Senate Committeee on Commerce, who stated:

> Let me remove any misconception as to what is meant by the term 'damages.' They are not speaking of damages in the sense of those consequential damages that may result from a break of a levee in the

future which may overflow some places. It is settled by the jurisprudence of the United States Supreme Court that neither the Federal Government nor the State is responsible for damages resulting from a break in a dam or levee. The damage that is spoken of in the proposal is the damage in the taking. You may not take the right of way on which the railroad is built in the sense that you take the fee, but when you cause that railroad to be moved or reconstructed in order to create a spillway, let us say, you damage the railroad, and it is a damage in the taking; it is a damage resulting from acquisition of necessary property, whether you pay for the property and take the fee or whether you pay damages in the way of flowage right, or whether you destroy a railroad or other property. It is the constitutional protection against the taking of property without just compensation which is involved, and not the consequential damage in the future resulting from the failure of the protective works.[19]

In 1936, Congress again addressed the problem of flooding and flood control. The Flood Control Act of 1936 was designed to enable flood control projects in areas other than the Mississippi River. It contains a disclaimer found at 33 U.S.C. 701(C). However, it is phrased differently than that found in 702(C) and clearly only pertains to damages arising out of the construction of the projects. Section 3 of the act provides that none of the money appropriated could be expended until the local interests proved that they would "b) hold and save the United States free from damages due to the construction works."[20]

Again, at that juncture in history the government still enjoyed total immunity from suit in tort. There was no

---

[19]Hearings Before the Committee on Commerce, U.S. Senate 70th Cong., 1st Sess., Relative to Flood Control of the Mississippi River, January 23 to February 24, 1928, p. 73.

[20]33 U.S.C. 701 c, June 22, 1936, ch. 688 Sec. 3, 49 Stat. 1571.

need for concern for consequential damages because there was no such cause of action. The only damages anyone contemplated when either statute was enacted were those involved in the taking of property. In retrospect this is clear. In the Atchafalaya Spillway area today most of the property is owned by private individuals and the government has a right, easement, or servitude of flowage over this property. The owner may utilize the property in any manner he deems appropriate. He may grow crops, raise cattle, or utilize the property in any other productive manner. However, when the level of the Mississippi River or its system reaches a point where the Corps of Engineers feels it is necessary to open the spillway gates, they do so with a warning to the landowners. Any damage which results in the flowage or floodage of this property does not give rise to a cause of action against the government. It is protected by 702(C).

However, as the majority opinion correctly concludes, when the damage or injury results from the negligence of the government "in omissions or commissions that diverge from acts strictly for the purpose of controlling floods or floodwater, and the presence of movement of water for flood control purposes merely furnishes a condition of the accident, there is no section 702c immunity.[21]

In interpreting the immunity clause of 702(C) the courts have failed to look past the language itself and into the historical perspective of its origin. The lead case in the interpretation of the application of the 702(C) clause is *National Manufacturing Company v. United States*, 210

---

[21]App. 28a.

F. 2d 263 (8th Cir. 1954), *cert. den.* 347 U.S. 967, 74 S.Ct. 778, 98 L. Ed. 1108 (1954). The court gave its interpretation of the clause reasoning that it was designed to limit the liability of the government after the government had expended large sums for flood control projects. It is unclear where the court gained its insight into the Congressional purpose for enacting the clause. However, it seems certain that it was not from any analysis of the debates and testimony at the time of its passage. Had such been done, the inescapable conclusion would have been that the clause refers to "damages" in the acquisition and taking of property and not in consequential damages.

However, *National Manufacturing Company v. United States, supra*, set the standard and the next question was how far this immunity would reach. Does it only preclude liability when the damage was a direct result of the flood control activity, or does it extend to any negligence associated with a flood control project? The courts have uniformly held the government immune from liability for damages occurring in the negligent operation of a flood control project.[22] However, in each instance the damage

---

[22]*Aetna v. United States*, 628 F. 2d 1201 (9th Cir. 1980), cert. denied 450 U.S. 1025, 101 S. Ct. 1732, 68 L. Ed. 2d 220 (1981) (negligent construction of Teton Dam caused its collapse and property damage caused by overground water);

B Amusement Company v. United States, 180 F. Supp. 386 (Ct. of Cl. 1960) (negligent construction of flood control project resulted in overground flooding and property damage);

Atkinson v. Merritt, Chapman, & Scott Company, 126 F. Supp. 406 (N. D. Cal. 1954) (negligent collapse of cofferdams caused overgrourd flooding of construction site);

(Continued on following page)

(Continued from previous page)

Burlison v. United States, 627 F. 2d 119 (8th Cir. 1980) cert. denied 450 U.S. 1030, 101 S. Ct. 1740, 68 L. Ed. 2d 225 (1981) (negligent design, construction, and operation of road and drain portion of flood control project caused overground flooding and property damage);

Callaway v. United States, 568 F. 2d 684 (10th Cir. 1978) (negligent construction of a bridge embankment built in connection with a flood control project resulted in overground flooding and damage to crops and other property);

Clark v. United States, 218 F. 2d 446 (9th Cir. 1954) (negligent construction of embankment lead to overground flooding of and damage to a housing project—reputed loss of 14 lives);

McClaskey v. United States, 386 F. 2d 807 (9th Cir. 1967) (negligent construction of temporary rock fill structure as part of flood control project caused backwater overground inundation of property);

Parks v. United States, 370 F. 2d 92 (2nd Cir. 1966) (negligent construction, maintenance, and operation of flood control project caused overground flooding and damage to property);

Penderdolph v. Derry Township, 330 F. Supp. 1346 (W. D. Penn. 1971) (negligent operation of dam gates caused overground flooding resulting in washing car off bridge and death of driver);

Pierce v. United States, 650 F. 2d 263 (8th Cir. 1979) (negligent impounding of water behind flood control dam caused overground inundation of and damage to property);

National Manufacturing Company v. United States, supra, (negligence in giving erroneous weather and flood information resulted in overground inundation of property);

Stover v. United States, 204 F. Supp. 477 (N.D. Cal. 1962) *aff'd.* 332 F. 2d 203 (9th Cir. 1964) *cert. denied* 379 U.S. 922, 85 S. Ct. 276, 13 L. Ed. 2d 385 (1964);

Taylor v. United States, 590 F. 2d 263 (8th Cir. 1979) (negligent operation of dam resulted in backwater overground inundation of property);

Villareal v. United States, 177 F. Supp. 8979 (S.D. Tex. 1959) (negligent design, construction, maintenance, and operation of flood control diversion floodway system of Rio Grande River caused overground inundation of property).

was caused by some act in the operation of the flood control project itself. Either the negligent design, negligent construction, negligent maintenance, or negligent operation of the facility caused the damage. All, with the exception of *Florida East Coast Railway v. United States,* 519 F. 2d 1184 (5th Cir. 1975), involve overground flooding. In this case the railroad tracks were washed out as a result of the negligent construction of a flood control project. The damage was not caused by overground floodwater, however, but by run off water which was trapped by the project and washed out the tracks. The damage, however, was still caused by the negligent design and operation of part of the flood control works. This negligence in connection with the designated purpose of the control structure was the proixate cause of the property damage to the tracks. It is also interesting to note that the majority found no federal appellate cases directly construing and applying the immunity provision which granted immunity to the government for personal injury.[23] Of twenty-three cases, twenty-one were brought to recover for property damage.[24] The remaining two cases sought recovery for wrongful death, but were decided on other grounds without reaching the 702(C) issue.[25]

Immunity has been denied when the court has found that the flood-caused damage was unrelated to the func-

---

[23]App. 19a-20a.

[24]*Clark v. United States, supra,* sought recovery for property damage in a housing project and a "reputed" loss of 14 lives.

[25]*Wright v. United States,* 568 F. 2d 153 (10th Cir. 1977) *cert. denied* 439 U.S. 824, 99 S. Ct. 94, 58 L. Ed. 2d 117 (1978); *Lunsford v. United States,* 570 F. 2d 221 (8th Cir. 1977).

tioning of the flood control project. Thus, the mere existence of a flood control project is not enough to trigger the immunity. There must be some connection with the project and the resulting damage. In *Peterson v. United States,* 367 F. 2d 27 (9th Cir. 1966) the damage was caused when the government dynamited an ice jam. This was accomplished by engineers from Ladd Air Force Base in Alaska and disrupted the natural breakup of the ice. This ice was discharged downriver and damaged the plaintiff's vessels. In denying immunity under section 702(C) the court found that the "decision to dynamite the ice jam was wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control, or any act undertaken pursuant to any such authorization."[26] The court reviewed the holdings in *National Manufacturing v. United States, supra,* and *Clark v. United States, supra,* and found that the factual situation involving the dynamiting of the ice jam was clearly distinguishable. Similarly, the Fifth Circuit Court of Appeal refused to extend the immunity provision to flooding resulting from the government's negligent construction of the Mississippi River Gulf Outlet. The court found that this was a navigation project rather than a flood control project, and, therefore, the immunity provision was inapplicable. The facts were similar to those found in *Florida East Coast Railway v. United States, supra.* In both, the negligent building of the project caused flooding when none had existed before under similar climatological conditions. The difference, however, was the former was a navigation project and the latter was a flood control project.

The majority opinion looks to the purpose being served by the negligent conduct. Two cases have discussed

---

[26]*Peterson v. United States, supra,* at 275.

the multiple use concept or test for flood control projects. In *Morici v. United States*, 681 F. 2d 645 (9th Cir. 1982) the court granted immunity to the government even if the negligence was caused by the operation of the project for a purpose other than flood control. However, in *Hayes v. United States*, 585 F. 2d 701 (4th Cir. 1978), the court held the reverse. Rather than grant blanket immunity for any conceivable negligent act associated with a flood control project, the court took a more common sense approach. The court reasoned that if the facility were a dual purpose facility and the negligent action was related to a recreational use of the impounded waters, then the plaintiff should prevail. The majority in the instant case adopts the same rationale. "The goverment is not liable for any fault of its employees in controlling floodgates or managing lands to contain, prevent or manage floods or floodwaters. This immunity, however, does not extend to the fault of government employees in failing to warn the public of the existence of hazards to their accepted use of government-impounded water, or nearby land. Because of section 702c, the government's acts to store, divert, and release waters to further flood control are subject to no risk of liability. If, however, the government allows people to come upon those waters or nearby shores for purposes of recreation, section 702c grants no immunity for government fault in creating a danger or in failing to warn of danger to the public. If a producing cause of the damage or injury is a government employee's negligence in omissions or commissions that diverge from acts strictly for the purpose of controlling floods or floodwaters, and the presence of movement of water for flood control purposes merely furnishes a condition of the accident there is no section 702c immunity."[27]

The facts of this matter are the same. Kenneth Clardy was fishing above the Bayou Courtableau flood control structure. The negligence complained of was not in the operation, construction, nor design of the structure itself. The negligence was in the failure to adequately warn fishermen and others involved in recreational use of the impounded water of the hazards posed by the control structure. Therefore, the action by the Clardy's should be maintained and the decision of the Fifth Circuit Court of Appeals reversing the summary judgment should be affirmed.

CONCLUSION

For the reasons aforesaid, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

SAM J. D'AMICO
J. MICHAEL MCDONALD

February 1986

---

[27]App. 27a-28a.

REPLY

BRIEF

No. 85-434

Supreme Court, U.S.
FILED
APR 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLOTTE JAMES

UNITED STATES OF AMERICA, PETITIONER

v.

KATHY BUTLER, INDIVIDUALLY AND AS SURVIVING WIFE AND HEIR OF EDDY BUTLER

UNITED STATES OF AMERICA, PETITIONER

v.

SUSAN B. CLARDY, INDIVIDUALLY AND AS NATURAL TUTRIX OF THE MINORS, BRIDGET MARIE CLARDY AND KENNETH CLARDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-434

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLOTTE JAMES

UNITED STATES OF AMERICA, PETITIONER

v.

KATHY BUTLER, INDIVIDUALLY AND AS SURVIVING WIFE AND HEIR OF EDDY BUTLER

UNITED STATES OF AMERICA, PETITIONER

v.

SUSAN B. CLARDY, INDIVIDUALLY AND AS NATURAL TUTRIX OF THE MINORS, BRIDGET MARIE CLARDY AND KENNETH CLARDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

This case presents a question of statutory interpretation, but respondents spend less than a single page of their answering briefs analyzing the words that Congress chose when it enacted 33 U.S.C. 702c, the statute that is before this Court. Not surprisingly, respondents seek to divert the Court's attention from the fact that Congress wrote in sweeping terms when it drafted the immunity provision at issue here: "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place" (33

U.S.C. 702c). Respondents instead engage in complex analyses of the legislative history of Section 702c in an effort to justify a potpourri of proffered limitations upon the scope of the statute. This intensive examination of the legislative history and studied avoidance of the plain words of Section 702c gives birth to contradictory and completely improbable conclusions regarding the meaning of the statute. We submit that the language of the statute, the legislative history, and the unanimous judicial construction of Section 702c all strongly support our conclusion that the statute bars the imposition of tort liability upon the government in the circumstances presented here.

1. We demonstrated in our opening brief (at 12-19) that the plain language of Section 702c immunizes the United States from tort liability for damage resulting from the release of flood waters from a flood control project. Respondents James and Butler assert (Br. 12-13) that our argument constitutes an effort to "short-circuit[]" this Court's analysis of the meaning of Section 702c. But the Court recently reaffirmed that the starting point in statutory interpretation is "the language of the statute. If the statute is clear and unambiguous 'that is the end of the matter.'" *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 6 (citation omitted); see also U.S. Br. 12-13. Examination of the statutory language thus does not "shortcircuit[]" the proper inquiry; it is the mandatory first—and most important—step in ascertaining the meaning of the statute.

Respondents James and Butler argue that Section 702c should not be interpreted according to its plain meaning for two reasons. First, they assert (Br. 13) that Section 702c is ambiguous because it "appears to be addressed to the damages caused by actual floods or the downstream injury or damage caused by the discharge of flood waters." Section 702c by its terms refutes this claim of ambiguity because the statute immunizes the United States from liability "for any damage from or by floods

or flood waters *at any place*" (emphasis added). The location of the damage is simply irrelevant.

Second, these respondents contend (Br. 13-14) that Section 702c "is not to be applied literally" because, despite the statute's broad language, Section 702c does not override the Just Compensation Clause of the Fifth Amendment and, in addition, several other provisions of the Flood Control Act of 1928 authorize monetary compensation in certain circumstances in which property is damaged by flood waters. Even if the statute could be considered ambiguous in these circumstances—rather than simply inapplicable because of the existence of separate explicit remedies recognized by the Congress that enacted Section 702c—any such ambiguity would be relevant only in a case presenting the question whether Section 702c applied in such circumstances. The possible existence of such peripheral issues regarding the meaning of Section 702c cannot render the statute ambiguous here, where neither the Fifth Amendment nor the portions of the 1928 Act providing for compensation are even arguably implicated.

In view of the absence of any ambiguity in the meaning of Section 702c as applied to the circumstances presented here, the statute should be interpreted in accord with its plain comprehensive language—that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." Section 702c therefore immunizes the United States from tort liability for the damage incurred by respondents.[1]

---

[1] Respondent Clardy argues (Br. 6) that the statute is ambiguous "because of the lack of a need for the immunity clause." As a threshold matter, the purpose of a statute simply cannot render the statute's terms ambiguous. The inquiry is whether the statutory *language* is clear, and respondent Clardy does not appear to contend that the terms of Section 702c are ambiguous. Moreover, as we discussed in our opening brief (at 18-25), Congress itself determined that the broad immunity provision that became Section 702c was necessary to ensure that a firm limit would be imposed upon

2. Respondents' rationale for ignoring the plain language of Section 702c is the same as the justification advanced by the court of appeals—that the legislative history demonstrates that Congress did not mean what it said when it drafted the statute. However, respondents do not even agree among themselves upon the construction of Section 702c that is mandated by this supposedly clear evidence of legislative intent: respondent Clardy and the court of appeals present a different interpretation of the statute from that adopted by respondents James and Butler. This conflict by itself demonstrates the flaws in respondents' efforts to use the legislative history of Section 702c to circumvent the plain language of the statute. As we demonstrated in our opening brief (at 19-32), the legislative history actually shows that Section 702c should be interpreted in accordance with its plain meaning because Congress intended to bar the imposition upon the United States of any costs associated with the flood control program other than the costs that the government specifically assumed by statute.

Before turning to the basic errors in respondents' interpretations of the legislative history of Section 702c, these legislative history arguments must be placed in proper perspective. In *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U.S. 531 (1978), this Court considered a question of statutory interpretation analogous to the question presented here. The Court noted that the terms of the statute at issue in that case were "broad

---

the government's financial liability in connection with the flood control program.

It is noteworthy that respondents do not embrace the other supposed "ambiguities" in Section 702c cited by the court of appeals (see U.S. Br. 15-17). Indeed, respondent Clardy concedes (Br. 15), that the term "damage" is not ambiguous and encompasses both injury to property and injury to persons; she argues only that Congress intended the term to have a special limited meaning—including only property damage—in the context of Section 702c. We showed in our opening brief (at 28-30) that the legislative history does not justify limiting the scope of Section 702c in this manner. See also page 7, *infra*.

and unqualified," and observed that "[i]f Congress had intended to limit [the statute's] scope * * * it is not unreasonable to assume that it would have made this [limitation] explicit" (438 U.S. at 550). Even though the legislative history did not "point unambiguously to the answer," the Court construed the statute in accord with its plain meaning, finding that the legislative history did not provide the necessary "substantial support for limiting language that Congress itself chose not to limit." *Ibid.* (footnote omitted); see also *Board of Governors* v. *Dimension Financial Corp.*, slip op. 12 ("[t]he 'plain purpose' of legislation * * * is determined in the first instance with reference to the plain language of the statute itself. * * * Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent"); U.S. Br. 18-20, 29. Since the terms of Section 702c are similarly broad and unqualified, respondents' narrow interpretations of the statute can prevail only if respondents show a clear congressional intent to restrict the broad immunity rule established by the language of the statute. Respondents' arguments based upon the legislative history of Section 702c do not come close to demonstrating that Congress had such an intent when it enacted Section 702c.[2]

---

[2] In an attempt to avoid this heavy burden, respondents James and Butler put forward the novel argument (Br. 14-15) that, despite the broad language of Section 702c, the statute should be presumed *not* to immunize the government from tort liability. They assert that this approach is justified because Section 702c would be superfluous if it were viewed as only establishing such immunity. But respondents' presumption puts the cart before the horse in interpreting Section 702c. As we showed in our opening brief (at 19-25), Congress quite naturally was concerned that this huge new public works program could subject the government to unforeseen liability; it wanted to ensure that the government would incur only the costs specifically assumed by statute. Since Congress intended to enact a provision establishing that the government was immune from all liability—contract, tort, or any other type—in order to reinforce the protection conferred by sovereign immunity, Section

a. Respondent Clardy essentially adopts the court of appeals' analysis of the legislative history of Section 702c, arguing (Br. 13-16) that the sole effect of the provision is to immunize the government from liability for certain types of property damage as to which compensation was authorized by the Senate version of the Flood Control Act. As we explained in our opening brief (at 26-27), however, this narrow interpretation of Section 702c is implausible for several reasons. First, such a construction of the statute is inconsistent with the broad language of Section 702c and is precluded by portions of the legislative history indicating that Congress acted with a broader intent in adopting Section 702c. Second, this view of the statute would render Section 702c completely unnecessary; the House of Representatives eliminated the possibility of government liability for these limited categories of property damage by deleting the provision of the Senate bill authorizing compensation.[3]

702c is not superfluous. It fulfills Congress's purpose of providing additional protection from such liability. Thus, respondents' "presumption" is nothing more than another embodiment of their erroneous conclusion regarding Congress's purpose in enacting Section 702c. See pages 7-11, *infra*.

[3] Respondent Clardy argues (Br. 15-16) that a statement concerning the meaning of the term "damages" made by one witness at a House committee hearing supports her construction of Section 702c. But this witness—a representative of the City of New Orleans—was not referring to Section 702c; he was discussing certain references to "damages" in the Jadwin flood control plan, and his statement therefore provides no basis for construing the term "*any* damage" in Section 702c (emphasis added). In addition, of course, the general remarks of a single witness at a congressional hearing, who did not draft the provision in question, are entitled to little weight in ascertaining congressional intent, especially where, as here, the witness's comments were not even directed to the meaning of the relevant provision of the statute. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 203-204 n.24 (1976); see also *S & E Contractors, Inc.* v. *United States*, 406 U.S. 1, 13 n.9 (1972). The reliance of respondents Butler and James (Br. 18-19) upon similar references to "damages" in the legislative history is misplaced for the same reason—the materials that they cite do not in any way refer to Section 702c.

Moreover, Section 702c cannot be read to grant immunity from liability only for property damage simply because many of the examples cited in the legislative history relate to property damage. Congress's "choice of * * * general language" demonstrates that even if Section 702c was prompted principally by concerns relating to liability for property damage, Congress could not have intended to limit the immunity provision to that situation. *Board of Governors* v. *Dimension Financial Corp.*, slip op. 10; see also U.S. Br. 28-29.

b. Respondents James and Butler, on the other hand, jettison the court of appeals' analysis of the legislative history of Section 702c, and their own position in the court of appeals, in favor of an interpretation of the provision that is so narrow—and so completely unrelated to the statutory language—that it is utterly preposterous. Respondents observe that two provisions of the 1928 Flood Control Act—the proviso to Section 702c and Section 702d—expressly impose liability upon the government for two limited types of property damage. They conclude that "[t]he purpose and effect of section 702c * * * is to preclude actions against the federal government under [these provisions] where the alleged damages do not rise to the level of a constitutional taking" (Br. 28 (footnote omitted)). In other words, the sole effect of Section 702c is to prevent injured property owners from maintaining an action under the Tucker Act, 28 U.S.C. 1491, to obtain the compensation authorized by these two provisions of the Flood Control Act. Neither the legislative history, the language of the statute, nor common sense supports this attempt to eviscerate Section 702c.

First, respondents' conclusion is based upon several misconceptions regarding the legislative history of Section 702c. Contrary to respondents' assertion (Br. 21-22 & nn. 8, 9), there is no evidence that Sections 702c and 702d were the product of a single package of amendments designed to replace the generous compensation provision contained in Section 4 of the Senate bill. At the outset, nothing in the congressional debates indicates that the

immunity provision was offered in response to the Senate bill provision.[4] And the immunity provision was not tied to the proviso contained in Section 702c. Representative Reid introduced the immunity provision, while the proviso to Section 702c was proposed separately by Representative Garrett; this different sponsorship and the controversy regarding the Garrett amendment (it was accepted by a vote of 111-79 while the immunity provision was accepted without debate) show that the two amendments were not intended to constitute a single proposal (see 69 Cong. Rec. 7022-7023 (1928)).

Moreover, the debate regarding the proviso did not touch in any way upon the meaning of the immunity provision. The proviso was designed to address the unique problem of whether compensation should be provided to property owners affected by the construction of levees on the opposite bank of the river. There is no indication that Congress viewed the immunity provision as having any effect upon the availability of the compensation authorized by the proviso. 69 Cong. Rec. 6642, 7022-7023 (1928). Finally, the provision regarding the acquisition of flowage rights that became Section 702d was the subject of a separate controversy because of the potential scope of the expense to the government; the debate does not reveal any relationship between the immunity provision and Section 702d (see 69 Cong. Rec. 7104-7111 (1928)).

Since Congress did not adopt these three provisions as part of a single proposal—or even with reference to one

[4] Respondents' discussion of Representative Reid's remarks (Br. 21 n.8) is quite misleading. Representative Reid *first* stated that he would "present amendments embodying everything the President asked, with the single exception of agreeing to one thing—and I will never * * * support any section of this bill which will permit [the use of floodways] * * * without first acquiring the rights of way or the flowage rights" (69 Cong. Rec. 7000 (1928)). He *subsequently* stated in a separate passage of his remarks that "[w]e are going to move to strike out the section with respect to the railroads, which is section 4" (*id.* at 7001). Thus, Representative Reid did not indicate that the immunity provision was in any way related to the elimination of Section 4 of the Senate bill.

another—the legislative history provides no basis for concluding that the immunity rule set forth in Section 702c should be interpreted by reference to the other two provisions. Cf. *United States* v. *St. Paul, M. & M. Ry.*, 247 U.S. 310, 314-315 (1918) (proviso not interpreted by reference to remainder of statutory provision where legislative history indicated that the two portions of the statute were unrelated). Accordingly, the legislative history does not provide any support for respondents' contention that the sole purpose of the immunity provision was to bar property owners from seeking the compensation authorized by the proviso and Section 702d. And because the immunity provision was not adopted with reference to Section 4 of the Senate bill, it similarly cannot be construed by reference to that provision.

We agree with respondents that Section 702c was designed to "cabin the fiscal impact" of the flood control program (Br. 23). We disagree with their unsupported conclusion that Section 702c was intended to bar only liability for the compensation described in the proviso and Section 702d. Congress, aware of the many potential types of liability that could be imposed upon the federal government as a result of the vast public works project—and of the devastation that could be caused by flood waters (see U.S. Br. 20-21)—wanted to disclaim all liability not specifically assumed by statute. As one key legislator stated, "I do not want to have anything left out of the bill that would protect us now and for all time to come. I for one do not want to open up a situation that will cause thousands of lawsuits for damages against the Federal Government in the next 10, 20, or 50 years" (69 Cong. Rec. 6641 (1928) (remarks of Rep. Snell)). The legislative history therefore does not provide the clear evidence needed to narrow the plain language of Section 702c.[5]

[5] Respondents repeatedly characterize our position as rendering Section 702c meaningless, but, in view of the doctrine of sovereign immunity, any governmental disclaimer of liability necessarily is superfluous to some extent. Indeed, one congressman noted in the

Second, respondents' interpretation of Section 702c makes little sense. Congress plainly thought it important that property owners be provided with compensation in the situations addressed in the Section 702c proviso and in Section 702d. See 69 Cong. Rec. 7000, 7105-7106 (1928) (remarks of Rep. Reid) (importance of compensation for flowage rights); *id.* at 6642, 7022 (remarks of Rep. Garrett) (compensation for property owners eligible under proviso). It would have been peculiar for Congress at the same time to give government officials complete discretion to decide whether to provide this compensation. In any event, a congressional determination regarding the remedies available to property owners logically would be found in the statutes that authorize compensation, not in a separate broadly-worded provision that does not expressly reference those statutes.[6]

Not surprisingly, no court even has intimated that the immunity provision of Section 702c is in any way related to the availability of the Tucker Act remedy with

---

House debate that Section 702c was to some extent superfluous because it was a restatement of the government's sovereign immunity (69 Cong. Rec. 7028 (1928) (remarks of Rep. Spearing)). Our point is that Congress wanted to reaffirm this protection out of an abundance of caution, in order to avoid any possibility that its decision to embark upon the vast flood control program could be viewed as accepting financial liability except to the extent specific costs were assumed by statute. It accordingly makes sense to view the provision as "[d]riving down a clear stake [reaffirming sovereign immunity] in such a dangerous area" (Pet. App. 35a n.4 (Gee, J., dissenting)).

[6] One basic flaw in respondents' argument is that they do not suggest that Section 702c eliminates the Tucker Act remedy for constitutional taking claims, even though nothing in the legislative history indicates that Congress viewed the statutory rights as having a lesser status. Similarly, nothing in the language of Section 702c indicates that the immunity provision affects only the government's liability under these statutory provisions. Respondents intimate (Br. 22-24) that the condemnation provision set forth in Section 702d provides support for their position, but the same condemnation provision applies to takings for which compensation is required by the Fifth Amendment. It therefore cannot support the distinction drawn by respondents.

respect to this statutorily-required compensation. Indeed, the single decision cited by respondents (see Br. 28 n.16) simply held that a property owner could not seek such compensation in district court. The court of appeals adopted the district court's decision indicating that a Tucker Act remedy might well be available in the Court of Claims. *United States* v. *9 Acres of Land*, 100 F. Supp. 378, 379 (E.D. La. 1951), aff'd *sub nom. Oyster Shell Products Co.* v. *United States*, 197 F.2d 1022, 1023 (5th Cir.), cert. denied, 344 U.S. 885 (1952).

Third, respondents' interpretation of Section 702c completely ignores the language of the statute. Surely Congress would have written more specifically if its sole intent was to bar actions for compensation pursuant to the Section 702c proviso and Section 702d. The fact that Congress wrote broadly in Section 702c by itself precludes respondents' incredibly narrow interpretation of the statute.

c. Respondents claim (James Br. 29-31) that several other statutes support their narrow interpretation of Section 702c. As a threshold matter, however, these other statutes have limited value in interpreting Section 702c; neither the statutes themselves nor their legislative histories refer in any way to Section 702c. Moreover, respondents' arguments are without merit.

First, respondents cite (Br. 30) a reference in the legislative history of the Federal Tort Claims Act to damages resulting from flood control activities, contending that this statement shows that Section 702c does not immunize the United States from tort liability for such activities. But the passage quoted by respondents does not even mention Section 702c, so it is impossible to view the legislative history of the Tort Claims Act as a post-enactment interpretation of Section 702c. And even respondents do not suggest that the Tort Claims Act effected the implied repeal of Section 702c. See, *e.g.*, *Allen* v. *McCurry*, 449 U.S. 90, 99 (1980) (repeals by implication are disfavored). Since the Tort Claims Act exceptions bar liability for especially hazardous activities

(see U.S. Br. 25 n.15), and government efforts to control flood waters plainly fall within this category, interpreting Section 702c to immunize the government from tort liability for flood control activities accords with Congress's general approach in this area.[7]

Second, respondents assert (Br. 31) that the absence of a similar immunity provision from the Flood Control Act of 1917 is somehow relevant to the interpretation of Section 702c. But, as we discussed in our opening brief (at 19-25), the 1928 statute established a federal flood control plan to be implemented an unprecedented scale; the 1917 Act did not represent any such new approach to flood control. It therefore is not surprising that Congress in 1928 decided to enact an immunity statute to ensure that the government would not be subjected to unforeseen liability as a result of the massive new federal undertaking.[8]

[7] Respondents argue (Br. 29 n.18) that our reference (U.S. Br. 27-28 n.16) to the Suits in Admiralty Act is inapposite. However, we did not argue that Congress expressly referred to the Suits in Admiralty Act in enacting Section 702c. We simply pointed out that Congress was aware of the possibility of governmental tort liability and would have wanted to guard against the imposition of such liability in connection with the flood control program. Furthermore, respondents surely are incorrect in suggesting that Section 702c is inapplicable to an admiralty action if the action seeks recovery for damage caused by flood waters. Since the cases cited by respondents do not address this fact situation, they simply are irrelevant.

[8] Respondents also contend (Br. 31) that the absence of a provision similar to Section 702c in a 1936 flood control statute shows that Section 702c should not be interpreted to impose a broad limit upon the government's liability. But, as respondents themselves subsequently observe, this 1936 statute was "an amendment and modification to the 1928 Act" that "carries forward section 702c" (Br. 41, 42). Thus, there was no need for Congress to reenact Section 702c in the 1936 statute. Respondent Clardy cites (Br. 16) a provision in a separate 1936 Flood Control Act (see 33 U.S.C. 701c), but, as we discuss below (see page 20, *infra*), that provision is irrelevant here because it relates to damage caused by "construction" not damage caused by "flood waters."

d. Finally, as we showed in our opening brief (at 32-34), the courts of appeals unanimously have concluded that Section 702c immunizes the United States from tort liability for damage by flood waters resulting from the operation of a flood control project. Indeed, respondent Clardy acknowledges that "[t]he courts have uniformly held the government immune from liability for damages occurring in the negligent operation of a flood control project" (Br. 18 (footnote omitted)). Although these decisions have concerned only property damage, no court has indicated that the immunity granted by Section 702c is limited to that context. This consistent judicial construction of Section 702c provides an independent basis for adopting our interpretation of the statute. See, *e.g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 731-733 (1975); Pet. App. 38a (Higginbotham, J., dissenting).[9]

Respondents James and Butler contend (Br. 46-48) that this settled unanimous view regarding the applicability of Section 702c in the circumstances presented here is irrelevant because the courts of appeals do not agree with respect to issues regarding the scope of Section 702c that are not implicated in this case. Respondents' nit picking cannot obscure the basic fact that the courts of appeals are in agreement that Section 702c broadly immunizes the government from tort liability for damage resulting from the release of flood waters in connection with the operation of a flood control project. Any differences among the courts of appeals regarding other issues are irrelevant; the courts' unanimous conclusion regard-

[9] Moreover, Congress was made aware of this settled interpretation of Section 702c. In *B Amusement Co.* v. *United States*, 180 F. Supp. 386 (1960), the Court of Claims reported to Congress pursuant to a resolution directing the court to evaluate a private bill that would have provided relief for flood damages. The court observed that the claimants had no "legal claim under a tort theory of recovery" because of the "long established policy of non-liability" set forth in Section 702c (180 F. Supp. at 389).

ing the basic scope of Section 702c is sufficient to dispose of respondents' claims here.[10]

3. Respondents James and Butler argue (Br. 32-40) that even if Section 702c generally immunizes the government from tort liability for damages resulting from the operation of a flood control project, the provision does not confer such immunity in the circumstances of this case. Respondents do not attempt to defend the rule adopted by the court of appeals—that Section 702c immunizes the government from liability for the release of flood waters but not for failing to warn of the danger of the released flood waters. Br. 35 n.21; see also U.S. Br. 30-32 (discussing court of appeals' failure to warn theory). They instead propose a different limiting principle, contending that Section 702c does not apply here because respondents' injuries resulted from the government's "mismanagement" of recreational activities, not from flood control activities. This artificial restriction of Section 702c is wholly unsupported by the language, legislative history, and purpose of the statute.

Section 702c immunizes the government from liability for "any damage from or by floods or flood waters." This affirmation of sovereign immunity should be interpreted in light of the general principle that a "clear relinquishment of sovereign immunity [is required] to give

[10] Respondents James and Butler claim (Br. 47) that the decisions of the courts of appeals are "consistent with" their argument that Section 702c does not confer any immunity from tort liability. This assertion is simply incredible; the courts of appeals' decisions refute respondents' interpretation of the statute because these courts have applied Section 702c to immunize the government from liability in tort. To the extent respondents' contention is that these appellate decisions limit the scope of the immunity conferred by Section 702c to property damage, respondents' position is unsupported because the courts of appeals have not found any such limitation in Section 702c. Moreover, such a limitation would be unsupportable in view of the plain language of the statute, which provides that the United States may not be subjected to "liability of any kind" for "any damage" from flood waters. See *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446, 450 (1947) (refusing to limit the term "damages" to injury to property); U.S. Br. 15.

justification for tort actions" (*Dalehite* v. *United States*, 346 U.S. 15, 31 (1953) (footnote omitted)).[11] By its plain terms, Section 702c precludes liability for *any* damage caused by flood waters. And nothing in the legislative history indicates that Congress intended to restrict the immunity conferred upon the United States. Here, the courts below found that respondents' injuries were caused by flood waters, and the damage for which respondents seek compensation thus falls squarely within the statutory prohibition.

Respondents' argument is that even where, as here, a plaintiff's injuries plainly are caused by flood control activities, immunity is not available if the injuries also are related in any way to government negligence unconnected to the flood control activities. Even if respondents' legal theory were correct, Section 702c still would bar respondents' claims because respondents do not identify an act of government negligence that was "neither necessary nor related to flood control" (Br. 32). Respondents refer several times to "negligent regulation and management of recreational activities" (Br. 34), but never identify a particular negligent act that caused the damage for which they seek compensation. It is possible that, in respondents' view, the failure to warn of the hazard of flood waters constitutes negligent conduct related to recreational activities. However, classifying the failure to provide a warning as a recreational activity is simple gamesmanship; after all, the release of the flood waters was a flood control decision and any warning related to the release of the waters therefore should be deemed a flood control activity. At a minimum, the failure to warn plainly was "related to" a flood control activity and therefore could not satisfy respondents' own standard for withdrawing Section 702c immunity.[12]

[11] Respondents argue that Section 702c should be narrowly construed (Br. 33, 35), but the decisions upon which they rely relate to *personal* immunities, not the government's *sovereign* immunity.

[12] It is instructive that the imaginative hypotheticals proffered by respondents (Br. 36-37) feature non-flood control negligence

Moreover, there is no support in the statutory language or legislative history for respondents' proposed limitation upon Section 702c. Indeed, restricting the scope of Section 702c in this manner would undercut Congress's purpose of barring the imposition upon the United States of all costs associated with the flood control program not expressly assumed by statute. To effectuate this purpose, Section 702c should be read in conformity with the plain language of the statute, as conferring immunity from liability in all situations in which flood waters are a cause of the plaintiff's damage. The courts of appeals have construed Section 702c in this manner, holding that Section 702c immunizes the United States from liability unless the damage is "'*wholly unrelated*' to a Congressionally authorized flood control project." *Morici Corp.* v. *United States*, 681 F.2d 645, 648 (9th Cir. 1982) (emphasis added); see also *Hayes* v. *United States*, 585 F.2d 701, 702-703 (4th Cir. 1978) ("[i]f the plaintiff could prove damage * * * *without relation to* the operation of the dam as a flood control project, he would avoid the absolute bar of § 702c") (emphasis added); *Graci* v. *United States*, 456 F.2d 20, 27 (5th Cir. 1971).[13]

much farther removed from flood control activities than was the failure to warn here. Respondents undoubtedly are aware that the supposedly separate cause in this case—the failure to warn—actually was related closely to the flood control activities.

[13] Respondents argue (Br. 34) that their limitation upon the scope of Section 702c is compelled by the "'bargain' * * * at the core of the 1928 legislation": that the federal government would absorb the costs of flood control and local interests would forfeit damages claims against the government. Of course, as respondents' failure to cite any portion of the legislative history in support of this argument makes clear, there is no evidence that Section 702c was the product of any such "bargain." (Indeed, respondents themselves do not even advert to this view of Section 702c in their own discussion of the provision's legislative history. Compare Br. 19-23 with Br. 34.) As we have discussed (see page 9, *supra*) it is more logical to view Section 702c as imposing a blanket limitation upon liability connected with the flood control program; any situation in which the government's liability results in any part from

Respondents argue (Br. 36-38) that this immunity standard is overbroad. But they propose a standard that would significantly reduce the scope of Section 702c, withdrawing immunity whenever some non-flood control government activity could be deemed a cause of the plaintiff's injuries. That standard would permit the imposition of liability upon the United States in situations in which, as here, it is plain that the direct cause of the damage was the release of flood waters. This evisceration of Section 702c simply does not comport with Congress's intent as expressed in the plain language of the statute.[14]

Furthermore, respondents' claim that our reading of Section 702c is overbroad rests in large part upon their misinterpretation (Br. 37, 38) of our position regarding the scope of the statutory immunity for damage "from or by" flood waters. As one distinguished commentator has observed, "[i]n a philosophical sense * * * the causes of an event go back to the dawn of human events, and beyond." *Prosser and Keeton on the Law of Torts* § 41, at 264 (5th ed. 1984). Tort law accordingly sets limits upon the situations in which an act may be deemed a legal cause of a plaintiff's injuries. The link between the defendant's conduct and the plaintiff's injuries may be too remote, or a subsequent negligent act may be categorized as a superseding cause of the plaintiff's injuries. See Restatement (Second) of Torts §§ 430-431, 440-452 (1965). Similarly, in a situation in which the connection between a plaintiff's damage and flood waters is attenuated, it may be possible to conclude that the damage cannot in any meaningful sense be deemed to have been caused by flood waters, and Section 702c therefore would not bar the imposition of liability upon the United States. As we

flood control activities therefore is encompassed within the congressional purpose.

[14] Respondents assure the Court (Br. 38) that their rule would not meaningfully expand the government's liability, but the vast scope of the flood control program (see U.S. Br. 33-34 & n.19) indicates that respondents' self-serving prediction is not likely to be correct.

have discussed, however, such a rule could not apply here because the damage for which respondents seek compensation resulted directly from the release of flood waters.

4. Respondents James and Butler contend (Br. 40-46) that Section 702c does not bar their tort claims because the flood control project at which they incurred their injuries—the Millwood Reservoir—was not constructed pursuant to the 1928 Flood Control Act, which included Section 702c. Respondents' claim that Section 702c applies only to projects constructed under the 1928 Act is plainly incorrect.[15]

Section 702c is not by its terms limited to flood control projects authorized under the 1928 Act. Indeed, in contrast to other provisions of the 1928 Act that are restricted to "the Mississippi River," [16] Section 702c provides immunity from liability for damage from flood waters "at any place." Congress in 1928 clearly contemplated the authorization of additional flood control projects; the 1928 Act itself directed the Army Corps of Engineers to prepare additional projects for submission to Congress for authorization (33 U.S.C. 702j).[17] It therefore is not surprising that Congress drafted Section 702c so that the provision would apply to flood control projects authorized by these contemplated future statutes. Accord *Aetna Insurance Co.* v. *United States*, 628 F.2d 1201, 1204 (9th Cir. 1980), cert. denied, 450 U.S. 1025 (1981); *Lenoir* v. *Porters Creek Watershed District*, 586 F.2d 1081, 1086 & n.4 (6th Cir. 1978); *National Manufacturing Co.* v. *United States*, 210 F.2d 263, 270 (8th Cir.), cert. denied, 347 U.S. 967 (1954).[18]

Respondents present a series of meritless arguments in support of their attempt to limit Section 702c to projects constructed pursuant to the 1928 Flood Control Act; none of these arguments shows that Congress did not mean what it said when it used broad language in writing Section 702c. First, respondents contend (Br. 41) that their narrow view of Section 702c is justified by their conclusion that the sole purpose of Section 702c is to bar actions under the Tucker Act. Since, as we have shown, respondents' interpretation of Section 702c is incorrect, this argument cannot justify the further limitation upon the scope of Section 702c urged by respondents here.

Second, respondents argue (Br. 41-43) that Section 702c only applies to projects constructed pursuant to statutes that amend the 1928 Act; they observe that the Millwood Reservoir was not constructed pursuant to such a statute. But the fact that Congress enacted some statutes as amendments to the 1928 Act and others as independent provisions does not provide any reason to limit the scope of Section 702c. Since Section 702c is not by its terms restricted to projects constructed under the 1928

---

[15] This argument does not affect the applicability of Section 702c to respondent Clardy's claim because the flood control project at which respondent Clardy's damage was sustained was authorized under the 1928 Act, as it was amended in 1936. See U.S. Br. 19 n.8. Respondents James and Butler do not dispute that Section 702c applies to projects constructed pursuant to that statute (Br. 41-42), and respondent Clardy acknowledges (Br. 3) that the Bayou Courtableau structure was constructed "[a]s part of this [1928] project."

[16] See, *e.g.*, 33 U.S.C. 702a and 702d. The proviso of Section 702c also applies only to the Mississippi River. In view of their separate origin (see page 8, *supra*), the restriction contained in the proviso provides no grounds for interpreting the scope of the immunity provision of Section 702c. The absence of similar limiting language in the immunity provision instead demonstrates that Congress intended the immunity provision to apply generally to all federal flood control projects.

[17] Indeed, the Millwood Reservoir is designed to control flooding by the Red River and its tributaries (see Flood Control Act of 1946, ch. 596, § 10, 60 Stat. 647), and projects to control flooding by the Red River and its tributaries were mentioned specifically in this provision of the 1928 Act.

[18] Respondents attack (Br. 45) the reasoning of these decisions because the courts of appeals rely on a provision of the 1936 Flood Control Act reaffirming the terms of the 1928 Act (see 33 U.S.C. 701e). But this provision is significant only because it reinforces the conclusion that Section 702c was not repealed by the subsequent statute; by its own terms Section 702c applies to projects constructed pursuant to all flood control acts.

Act, it applies to *all* projects, not simply projects constructed under the 1928 Act and its amendments.

Third, respondents note (Br. 43-44) that the 1936 Flood Control Act included a provision requiring states to "hold and save the United States free from damages due to the construction works" (33 U.S.C. 701c), and argue that the existence of this immunity provision is relevant in construing the scope of Section 702c. But the immunity provision contained in the 1936 Act relates to damage from "construction works" not the "damage from or by floods or flood waters" with which Section 702c is concerned. The fact that Congress added to the 1936 statute a second immunity provision relating to a different category of damage provides no basis for concluding that the immunity conferred by Section 702c is not available in connection with projects constructed pursuant to the 1936 Act. This additional immunity provision simply is irrelevant in interpreting the scope of Section 702c.[19]

Finally, respondents claim (Br. 44-45) that Section 702c does not apply because the statute authorizing the Millwood Reservoir was enacted in the same year as the Federal Tort Claims Act. This happenstance clearly provides no grounds for retroactively restricting the scope of Section 702c; Congress did not address the applicability of Section 702c in either of the two statutes enacted in 1946.

---

[19] Respondents also claim (Br. 44) that Section 702c does not apply to projects constructed pursuant to subsequent flood control statutes because the "1936 Act requires states and local governments to contribute substantially to the cost of flood control projects." But, as we have discussed (see page 16 note 13, *supra*), Section 702c was not enacted as a part of a "bargain" in which local citizens gave up a right to recover damages in exchange for federal expenditures; the statute was designed to bar government liability for damage from flood waters in connection with the construction and operation of the vast network of flood control projects. Since none of the subsequent statutes alters the federal government's construction and operational responsibilities with respect to flood control projects, they provide no basis for restricting the scope of Section 702c.

For the foregoing reasons, and the reasons stated in our opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

APRIL 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20190